Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

FEDERAL INSURANCE COMPANY,

Petitioner,

v.

KENNETH R. JONES, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

D John Travis
(*Counsel of Record*)
Alan M. Petrov
Robert H. Eddy
Richard C.O. Rezie
Gallagher, Sharp, Fulton
& Norman
1501 Euclid Avenue
7th Floor, Bulkley Building
Cleveland, Ohio 44115
(216) 241-5310
Attorneys for Petitioner.

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 1447(d) absolutely prohibits appellate review of an order remanding a cause from a District Court to a State court, even where such order of remand is not based to a fair degree on a good faith construction of the jurisdictional statute.

2. Whether 28 U.S.C. § 1447(d) absolutely prohibits appellate review of an order remanding a cause from a District Court to a State court, even where such remand is made for reasons not sanctioned by 28 U.S.C. § 1447(c).

3. Whether 28 U.S.C. § 1447(d) absolutely prohibits appellate review of an order remanding a cause from a District Court to a State court, even where such remand is made in contravention of the judicial power flowing from the Constitution of the United States and vested in the District Courts by Congress.

4. Whether an order by a District Court applying the 28 U.S.C. § 1332(c)(1) direct action proviso to abrogate diversity jurisdiction, where such proviso is inapplicable by ample precedent and Congressional intent, is erroneous and appealable under 28 U.S.C. § 1447(d).

5. Whether one has a right under the Constitution of the United States to proceed in a Court of the United States where Congress has vested that court with the judicial power delegated by the Constitution.

PARTIES TO THE PROCEEDING

Federal Insurance Company
15 Mountain View Road
Warren, NJ 07059
represented by:
D John Travis (0011247)
Seventh Floor, Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115
(216) 241-5310 - Telephone
(216) 241-1608 - Telefax

Kenneth R. Jones and Mary B. Jones
13571 Sousa St.
N. Lawrence, Ohio 44666
represented by:
Robert E. Soles, Jr., Esq.
John L. Juergensen, Esq.
Black, McCuskey, Souers & Arbaugh
1000 United Bank Plaza
220 Market Avenue South
Canton, Ohio 44702
(330) 456-8341 - Telephone
(330) 456-5756 - Telefax

American Motorists Insurance Company
1 Kemper Drive
Long Grover, IL 60049-0001
represented by:
Ronald A. Rispo, Esq.
Robert E. Goff, Jr., Esq.
Therese P. Joyce, Esq.
Weston, Hurd, Fallon, Paisley & Howley

2500 Terminal Tower
50 Public Square
Cleveland, Ohio 44113
(216) 241-6602 - Telephone
(216) 621-8369 - Telefax

Energy Insurance Bermuda Ltd.
P.O. Box HM 2064
Hamilton HM HX, Bermuda
represented by:
Mason Evans, Esq.
David Bloomfield, Esq.
Porter, Wright, Morris & Arthur
41 South High Street
Columbus, Ohio 43215
(614) 227-2000 - Telephone
(614) 227-2100 - Telefax

CORPORATE DISCLOSURE STATEMENT OF PETITIONER FEDERAL INSURANCE COMPANY

Federal Insurance Company is wholly owned by The Chubb Corporation. The Chubb Corporation owns 100% of Federal Insurance Company's stock. The Chubb Corporation is publicly traded on the New York Stock Exchange.

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The decision of the Sixth Circuit Court of Appeals: *Jones v. Federal Ins. Co.*, No. 01-4323 (6th Cir. Mar. 26, 2002) (App. A, pp. 1a-5a.); the decision of the District Court: *Jones v. Federal Ins. Co.*, No. 5:01CV1616 (N.D. Ohio Nov. 14, 2001) (App. B, pp. 6a-7a.); and the order of remand filed in this case but, apparently, intended for another matter: *Verhovec v. Wausau Ins. Co.*, No. 5:01CV662 (N.D. Ohio Nov. 14, 2001) (App. C, pp. 8a-9a).

JURISDICTION

The order of the United States Court of Appeals was entered on March 26, 2002 and found that it lacked jurisdiction, by application of 28 U.S.C. § 1447(d), to review the remand order entered by the District Court. Remand orders are generally final and appealable as set forth by this Court in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 714-15 (1996). This Court has jurisdiction under 28 U.S.C. § 1254(1) to review final orders of the Circuit Courts. *United States v. Shipp*, 203 U.S. 563, 573 (1906) ("But even if the Circuit Court had not jurisdiction to entertain [the] petition, and this court has no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law."). Whether the 28 U.S.C. § 1447(d) general prohibition on appellate review of remand orders is applicable to a specific order is the subject of this appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, § 1 and § 2, cl. 1-2:

Section 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

28 U.S.C. § 1447(c) and (d) provide:

"(c) A motion to remand the case on the basis of any defect

other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."

28 U.S.C.§ 1332(c)(1) provides:

"[A] corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business."

STATEMENT OF THE CASE

This case concerns an out-of-state insurer's removal of the cause to the United States District Court based on diversity

jurisdiction. The matter was filed in Stark County, Ohio Court of Common Pleas. (App. F at p. 36a.) Federal properly removed the cause to the United States District Court for the Northern District of Ohio based upon diversity of citizenship. (App. F, pp. 29a-46a.)

Federal is an Indiana Corporation with its principal place of business in New Jersey, and plaintiffs are citizens of Ohio. (App. F at pp. 30a, 37a.) The amount in controversy exceeds $75,000. (App. F at pp. 31a, 42a.) The District Court found that it lacked diversity jurisdiction based solely upon the application of the direct action proviso of 28 U.S.C. § 1332(c)(1), 78 Stat. 445 (1964) (hereinafter often referred to as the "direct action proviso") by which the citizenship of an insured is imputed to the insurer in a "direct action" on a policy of "liability" insurance. (App. B at p. 7a.)

The District Court's decision is representative of a new line of cases being decided in the Northern District of Ohio which creates a "new and murky jurisdictional quagmire[.]" *Villa v. Michigan Mut. Ins. Co.*, No. 1:01CV1707, 2002 U.S. Dist. LEXIS 9992, at *1 n.1 (N.D. Ohio Mar. 20, 2002). A clear spilt of authority has developed in the Northern District. Some judges in the District hold that federal jurisdiction exists in cases identical to this matter. Other judges in the District do not. The reasoning of those who decline to accept jurisdiction represents a significant departure from the precedent of all other judicial districts interpreting the direct action proviso. Federal courts outside the Northern District of Ohio (including the Southern District of Ohio) had been in accord that the direct action proviso applies only to suits sounding in tort liability filed directly against the tortfeasor's insurer where, due to peculiarities of state law, the tortfeasor need not be joined as a defendant.

Plaintiffs' claims in the case at bar are not direct actions against a tortfeasor's insurer. Rather, they are based upon a controversial decision of the Supreme Court of Ohio. In *Scott-Pontzer v. Liberty Mutual Fire Insurance Co.*, 85 Ohio St. 3rd 660 (1999), the Supreme Court of Ohio analyzed the definition of "Who Is An Insured" in the uninsured/underinsured motorist provisions of a corporation's insurance policy. *Id.* at 663. The Supreme Court found the definition ambiguous and, interpreting the ambiguity against the insurer, found that employees of the corporation were afforded uninsured/underinsured motorist coverage under their employer's policy for accidents outside the course and scope of their employment in non-company owned vehicles. *Id.* at 664. This and other insurance opinions of the Supreme Court of Ohio have spawned inconsistent and contradictory rulings across Ohio concerning uninsured/underinsured motorist coverage under employer's policies.

A plethora of "*Scott-Pontzer*" claims has followed. Plaintiff Kenneth R. Jones presented his *Scott-Pontzer* claims as an employee of American Electric Power, Co., Inc., Federal's named insured. American Electric Power is an Ohio corporation. Mr. Jones was injured in an accident with an allegedly uninsured/underinsured tortfeasor while riding his own motorcycle. (App. F at p. 38a.) Although his accident and injuries had nothing to do with his employment, pursuant to *Scott-Pontzer*, Mr. Jones asserts that he is an "insured" of Federal and entitled to recover under the Federal policy insuring American Electric Power. To that end, he filed suit in an Ohio state court.

Federal exercised its right to remove the action to the United States District Court, which was invested with the diversity jurisdiction set forth in Article III, Sections 1 and 2 of

the United States Constitution by act of Congress. This action should now be pending in District Court as a properly removed dispute between citizens of different states pursuant to the Constitutional power vested by Congress in that Court. The District Court, however, sought to find a way to remand the matter to state court, first issuing an order to show cause why the remand should not occur (App. D, pp. 10a-19a), and later interpreting the direct action proviso in 28 U.S.C. § 1332(c)(1) in a novel and strained manner (App. B, pp. 6a-7a). The District Court imputed American Electric Power's Ohio citizenship to Federal, even though the case against Federal was not a direct action on a policy of liability insurance. The District Court therefore concluded that it lacked diversity jurisdiction and remanded the case to State court based upon the policies it found to be embodied in the direct action proviso.

Federal timely appealed the District Court's remand order to the Court of Appeals for the Sixth Circuit, which found that it lacked jurisdiction to review the remand order because of the limiting provision of 28 U.S.C. § 1447(d), 63 Stat. 102 (1949) (hereinafter often referred to as "Section 1447(d)"). Federal argued to the Sixth Circuit that where Congress provides for jurisdiction, such jurisdiction flows from Article III, Sections 1 and 2 of the United States Constitution and, therefore, that a right secured by the United States Constitution had been violated. Federal also argued that the District Court's remand order had violated its rights to Equal Protection and Due Process of Law under the United States Constitution. The Sixth Circuit ruled that such constitutional considerations were not sufficient to afford it jurisdiction to review, a conclusion that puts the Sixth Circuit in conflict with decisions of the Third Circuit.

Federal also asserted that the District Court's decision

was not based, to a fair degree, upon a good faith interpretation of the direct action proviso. Federal argued that the District Court's decision was driven by its own public policy analysis, not by a fair reading of the language of either Section 1332(c)(1) or precedent interpreting it. Thus, the remand was not based on a lack of subject matter jurisdiction, the applicable reason for remand sanctioned by 28 U.S.C. § 1447(c) (hereinafter often referred to as "Section 1447(c)"). The Sixth Circuit concluded simply that "[t]he legal holding with which the defendant takes issue was in the context of the larger jurisdictional determination." (App. A at p. 4a.) Having reached this conclusion, the Sixth Circuit declined to analyze or review the basis of the District Court's determination. The refusal to make even a limited inquiry into the basis of the District Court's order of remand places the Sixth Circuit in conflict with decisions of the Tenth, Third, and Fourth Circuits.

REASONS FOR GRANTING THE WRIT

The issues presented by this case are issues about which the Circuit and District Courts disagree. First, whether the District Court's remand order is reviewable and the extent of the analysis required to determine reviewability under Section 1447(d) are issues about which a conflict exists between the Circuits. While the Sixth Circuit declined here to delve into the basis of the remand, the Fourth and Tenth Circuits review not only the reasons for remand stated in the order, but also its underlying legal basis to determine if the remand order is within the Section 1447(d) bar to appellate review. The Sixth Circuit's position is in conflict with that of the Fourth and Tenth Circuits on this issue.

Second, the Tenth, Sixth, and Third Circuits are also in conflict regarding whether the Section 1447(d) bar on review is

absolute where a District Court's remand order lacks a good faith basis, from a fair reading of a jurisdictional statute, as is mandated by Section 1447(c).

Third, the Fourth, Third, Tenth and Sixth Circuits are also in conflict as to whether review of non-routine jurisdictional determinations, such as Constitutional issues implicating the right to proceed in a Court of the United States and one's rights to Due Process and Equal Protection, is forbidden by the Section 1447(d) bar to review.

The Northern District of Ohio—in this case and others—has announced a new interpretation of the direct action proviso. This new interpretation has split even the District and is in conflict with all other federal courts that have passed upon this issue. Should this novel interpretation of the direct action proviso be followed in other jurisdictions, diversity jurisdiction would be destroyed in virtually all situations where an insured sues his or her insurer (or alleged insurer) and the cause is either removed to, or originally commenced in, federal court. The exception will devour the rule, and judicial power created in the Constitution will be contravened.

Should the remand order of the District Court and the finding of no appellate jurisdiction by the Sixth Circuit be allowed to stand, District Courts will have unfettered discretion in remanding cases, so long as they state somewhere in the order of remand that they are without subject matter jurisdiction. This is, in fact, what occurred here. Other federal courts have uniformly held that the direct action proviso does not apply to all actions filed against insurers—the proviso was intended to apply only to direct actions authorized by particular state statutes and arising out of policies of liability insurance. The District Court here employed the proviso with respect to a claim

that is neither a direct action nor one predicated upon liability insurance. The District Court's analysis is in conflict with the holdings of other federal courts. Ignoring Congressional intent and precedent, the District Court remanded this action under circumstances which call for at least some level of appellate review.

The Section 1447(d) bar on appellate review of an order of remand is not absolute. This Court and several Circuits have recognized exceptions to it in decisions which are now in conflict with the Sixth Circuit's analysis herein. The fundamental question is whether the ability to remove to and proceed in federal court, once set forth by Congress, is a statutory or a Constitutional right. Defining the scope (and the limitations) of the Section 1447(d) bar on appellate review of remand orders is both intertwined with the Constitutional issue of jurisdiction and an issue in its own right demanding this Court's supervising power. The Tenth and Third Circuits have found the Section 1447(d) bar to review to be inapplicable where the decision of the District Court is not based to a fair degree on subject matter jurisdiction, is not supported by a good faith finding, or presents constitutional issues. The Tenth, Third, and Fourth Circuits also conduct a plenary review of the District Court's remand order to determine the District Court's rationale.

This Court has held that policy-based remands, such as remands ordered merely to expedite the proceedings, are not a proper basis for remand under Section 1447(c) and thus not within the purview of the Section 1447(d) bar on review. The Sixth Circuit, however, has concluded that when a District Court makes even a perfunctory statement that it lacks subject matter jurisdiction, appellate review is barred by Section 1447(d). This analysis is in conflict with the decisions of this

Court and three Circuits.

For over two hundred years, the Constitution and Congress have recognized the importance of diversity jurisdiction to alleviate even the apprehension of local prejudice. The framers of the Constitution either felt such prejudice was a real possibility or indulged such fears in providing for diversity jurisdiction in the Constitution. Now, insurers are to be barred from federal court where they are sued by local insureds or would-be insureds—precisely where diversity jurisdiction is most needed. Insurers will be denied a right afforded to all others and, if the remands are unreviewable, will have no recourse whatsoever. The dire consequences for the insurance industry and the rights of all those who wish to proceed in federal court cannot be overstated. The Petition should be granted.

I. Certiorari should be granted to resolve the conflict as to whether a Circuit Court may review an order of remand to determine whether such order was based to a fair degree on a good faith finding that the District Court lacked subject matter jurisdiction or whether the District Court acted outside the scope of Section 1447(c).

The Circuits are in conflict as to the scope of review applicable in determining whether a remand is within the Section 1447(d) prohibition on review. Assuming that the basis of a remand order is reviewable to some degree, the Circuits also disagree as to whether a remand based on the public policy underlying a jurisdictional statute is reviewable.

As this Court has previously "explained in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), § 1447(d) must be read *in pari materia* with § 1447(c), so that

only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." (Parallel citations omitted). *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995). This holding implicitly mandates that the Circuit Courts review remands to determine if they are, in fact, based on a reason sanctioned by Section 1447(c). The only reason sanctioned in Section 1447(c) applicable herein is lack of subject matter jurisdiction.

The Tenth Circuit has held that "[m]ere mention of § 1447(c) or the 'magic words' of subject matter jurisdiction [] do not automatically render a remand order nonreviewable under § 1447(d)." *Flores v. Long*, 110 F.3d 730, 732 (10th Cir.1997). Further, the Fourth Circuit has held that "'powerful policy considerations and persuasive decisional authority support [the court of appeal's] authority—and responsibility—to look past contextually ambiguous allusions and even specific citations to § 1447(c) to determine by independent review of the record the actual grounds or basis upon which the district court considered it was empowered to remand.'" *Id.*, quoting *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1450 (4th Cir. 1996).

The standard of review employed by the Sixth Circuit herein is substantially more deferential, if not nonexistent, than that employed by the Fourth and Tenth Circuits. The Sixth Circuit never analyzed the District Court's decision to determine its basis or its Constitutional validity. The Sixth Circuit reasoned only that the District Court had "applied a jurisdictional statute" and, concluding that the District Court had purported to do so, did not even attempt to determine whether the District Court's decision was based, to a fair degree, on a good faith interpretation of the direct action proviso. (App. A at p. 4a.)

Nor did the Sixth Circuit analyze the constitutional issues presented, concluding only that they were not of sufficient "magnitude" to "warrant ignoring the prohibition of § 1447(d)." (App. A at p. 5a.) The Sixth Circuit's review was limited to whether the District Court used the "magic language" of jurisdiction and is thus in conflict with the standard of review utilized by the Tenth and Fourth Circuits. This Court's supervisory power is needed to rectify the disparate standards of review employed by the Circuits.

Had the Sixth Circuit utilized the standard of review used in other Circuits, it would have found the statutory basis for the District Court's remand to be lacking. Rather than basing its decision on the direct action proviso, the District Court based its decision to remand on the public policy it believed underlies the proviso. The District Court explicitly found that the direct action proviso was intended to apply where "state laws [] created diversity where it would not have existed before." (App. B at p. 7a (adopting the rationale and analysis set forth in *Kormanik v. St. Paul Fire & Marine Ins. Co.*, No. 5:01CV02122, 2001 U.S. Dist. LEXIS 23929 (N.D. Ohio Oct. 19, 2001)) and App. D at p. 15a (setting forth the analysis and rationale so incorporated).) But *Scott-Pontzer* is not a state law, it is a judicial decision. It does not create diversity, but is the basis for a cause of action. The District Court found only that *Scott-Pontzer* was "[m]uch like" the direct action statues in that it "has resulted in a burgeoning number of cases," being removed or brought in federal court based on diversity of citizenship. (*Id.*) The District Court then based its jurisdictional decision upon the court's own public policy view; that due to "the unsettled nature of the law . . . . [i]t makes far more sense for a state court to address these unsettled issues[.]" (*Id.*)

Other judges in the Northern District of Ohio have

recognized that applying the direct action proviso to actions by an insured against his or her own putative insurer is based on public policy rather than a principled interpretation of the direct action proviso. *Dolly v. Old Republic Insurance Co.*, No. 5:00CV1685, 2002 U.S. Dist LEXIS 9036, at *9-10 (N.D. Ohio May 8, 2002) ("Given the problem that *Scott-Pontzer* cases are becoming for federal courts, this is an attractive theory since, like the cases where the Ohio citizenship of the employer/insured destroys diversity, the Ohio citizenship of the employee/insured would also destroy diversity and require either remand or dismissal.")

Thus, another conflict exists between the Sixth Circuit and the decisions of this Court and the other Circuits. The Tenth Circuit has held that a remand order is appealable under 28 U.S.C. § 1447(d) if it is not "'based to a fair degree upon the [district] court's finding that it lacked subject matter jurisdiction to hear the case,'" *Dalrymple v. Grand River Dam Authority*, 145 F.3d 1180, 1184 (10th Cir. 1998), *cert. denied*, 525 U.S. 1069 (1999), quoting *Flores*, 110 F.3d at 733, or was not "made in good fath," *Dalrymple*, 145 F.3d at 1184, *Flores*, 110 F.3d at 733. *See also Archuleta v. Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997) ("The district court need not be correct in its determination that it lacked subject matter jurisdiction [] so long as it made that determination in good faith.").

The Sixth Circuit never reviewed the District Court's remand order to determine if it had a good faith basis or was based, to a fair degree, on the Section 1332(c)(1) proviso. The Sixth Circuit's conclusion that it lacked jurisdiction to review the basis of the remand order to determine if the order was within one of the reasons sanctioned by Section 1447(c) is in conflict with the standard employed by other Circuits. Had the Sixth Circuit used the proper standard of review, it would have

found the District Court's order appealable and erroneous.

II. Certiorari should be granted to address the split in the Circuits regarding whether Section 1447(d) applies to bar appeal where a non-routine determination is at issue.

The Third and Fourth Circuits have carved out an exception to the Section 1447(d) bar to review where the decision of the District Court is not of the type usually made in the context of a remand. As a subspecies of this exception, the Third Circuit has held that review of a remand order is not prohibited where constitutional issues are raised.

The Third Circuit has held that the where the "ruling which triggered the remand order, was not the type of jurisdictional determination routinely and regularly made pursuant to § 1447(c), [the] review of the district court's remand order [is] not barred by § 1447(d)." *Carr v. American Red Cross*, 17 F.3d 671, 682 (3d Cir. 1994). The Third Circuit went on to state that where a remand violates an "express Congressional specification[] of jurisdiction, we conclude[] that we [can] review the [] remand order[]." *Id.* Constitutional issues hold a special place in the Third Circuit's analysis as "courts will not impose restrictions on access to appellate review [of constitutional issues] unless Congress has expressed that intent by clear and convincing evidence." *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 845, (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992) citing, *Webster v. Doe*, 486 U.S. 592, 603 (1988). The Third Circuit has "not [found] clearly expressed congressional intent which would preclude review" of constitutional issues raised in a remand order based upon want of subject matter jurisdiction. *Id.*

For instance, in *Aliota v. Graham*, 984 F.2d 1350, 1357 (3d Cir. 1993), *cert. denied*, 510 U.S. 817 (1993), the court of appeals held that "the district court's remand order was reviewable because the district court's subject matter jurisdiction, within the meaning of § 1447(c), was established conclusively by the Attorney General's certification...." *Carr*, 17 F.3d at 682. Because jurisdiction was conclusively established, the District Court's erroneous remand order stood "'in marked contrast to the normal jurisdictional decisions made in connection with remand.'" *Carr*, 17 F.3d at 682, quoting *Aliota*, 984 F.2d at 1357. The Third Circuit found it reviewable. *Id.*; *accord Borneman v. United States,* 213 F.3d 819, 824-26 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001).

The Sixth Circuit held that Federal's arguments were not of sufficient constitutional "magnitude" to warrant an exception to Section 1447(d). (App. A at p. 5a.) The Sixth Circuit never endeavored to determine if the District Court's ruling was a routine determination, apparently failing to recognize any exception to Section 1447(d)'s restriction on review of an order of remand. Thus, the Sixth Circuit's decision is in conflict with those of the Third and Fourth Circuits. This presents both a Constitutional and a statutory issue upon which the Circuits are in conflict. Thus, the Petition should be granted.

III. Certiorari should be granted to resolve the conflict as to whether the Section 1332(c)(1) direct action proviso applies to suits by putative insureds against insurers seeking a determination that they are entitled to coverage.

The judicial power is created by the Constitution, but Congress decides where and when to vest the power. Thus, as discussed in the fourth reason for granting the Petition, Federal has a Constitutional right to proceed in federal court where

Congress has unambiguously vested jurisdiction in the federal court. The District Court's remand order in this case is in conflict with the decisions of many other District and Circuit Courts. The order is in conflict with those of other judges within the Northern District of Ohio, which is split on the issue. The position embraced by the District Court's remand represents a fundamental change in the nature and application of diversity jurisdiction under 28 U.S.C. § 1332. This issue itself presents a compelling reason for this Court to accept jurisdiction.

The District Court applied 28 U.S.C. § 1332(c)(1) to impute the citizenship of the named insured corporation to its insurer, thus destroying diversity. The key phrases in the direct action proviso, as applicable here, are whether this is a "direct action" and whether uninsured/underinsured motorist coverage is "a policy or contract of liability insurance." If either of these prerequisites are not met, the proviso does not apply and diversity jurisdiction unequivocally exists.

Other courts have uniformly held that when one sues a company alleged to be one's own insurer, the action is not a "direct action" within the meaning of 28 U.S.C. § 1332(c). *Accord State Farm Ins. Co. v. Evans,* 712 F.Supp. 57, 58 (E.D. Pa. 1989); *Field v. Liberty Mut. Ins. Co.*, 769 F.Supp. 1135, 1138 (D. Haw. 1991) ("Section 1332(c) applies in third-party tort liability cases, where the 'insured' is the defendant-tortfeasor, not the plaintiff-victim who is suing his own insurer on a contract theory."); *Kelly v. State Farm Mut. Auto. Ins. Co.*, 764 F.Supp. 1337, 1339 (S.D. Iowa 1991) ("[U]nless the cause of action urged against the insurance company is of such a nature that the liability sought to be imposed could be imposed against the insured, the action is not a direct action.") (citation and internal quotations omitted); *Barton v. Allstate Ins. Co.*, 729

F.Supp. 56, 57 (W.D. Tex. 1990) ("Section 1332(c)(1) and its legislative history clearly show that an action by an insured against his *own insurer* is not a 'direct action.'") (emphasis original); *Roby v. General Tire & Rubber Co.*, 500 F.Supp. 480, 484 (D. Md. 1980) ("The within case does not constitute the type of 'direct action' referred to in the proviso clause of Section 1332(c) ... plaintiffs are suing their own insurance company ... under the terms of an uninsured motorist provision[.]"); *Ferrara v. Aetna Cas. & Surety*, 436 F.Supp. 929, 931 (W.D. Ark. 1977); *Irvin v. Allstate Ins. Co.*, 436 F.Supp. 575, 577 (W.D. Ok. 1977); *Adams v. State Farm Mut. Auto. Ins. Co.*, 313 F.Supp. 1349, 1351-52 (N.D. Miss. 1970) (discussing the legislative history of Section 1332(c)); *Bishop v. Allstate Ins. Co.*, 313 F.Supp. 875, 876 (W.D. Ark. 1970); *Bourget v. Government Employees Ins. Co.*, 313 F.Supp. 367, 370-71 (D. Conn. 1970); *Inman v. MFA Mut. Ins. Co.*, 264 F.Supp. 727, 728 (E.D. Ark. 1967).

Other courts have uniformly held that uninsured and underinsured motorist coverage is not "liability insurance" within the meaning of 28 U.S.C. § 1332(c). As the Fifth Circuit held in *Hernandez v. Travelers Ins. Co.*, 489 F.2d 721, 724-25 (5th Cir. 1974), *cert. denied*, 419 U.S. 844 (1974), after reviewing the federal case law regarding uninsured/underinsured motorist coverage, "these cases hold, correctly, that an uninsured motorist policy is not a 'policy or contract of "liability insurance."'" (Citations omitted). *Accord Tuck v. United Services Automobile Ass'n*, 859 F.2d 842, 847 (10th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989); *Shief v. Tenet Healthsystem Hosp., Inc.*, No. 98-2838, 1998 U.S. Dist. LEXIS 19265, at *10-11 (E.D. La. Dec. 4, 1998); *Smith v. Zurich Am. Ins. Co.*, No. 95 - 3 004 C/W 95, 1996 U.S. Dist. LEXIS 73, at *4-5 (E.D. La. Jan. 2, 1996); *see Adams*, 313 F.Supp. 1349; *Bishop*, 313 F.Supp. 875; *Inman*, 264 F.Supp.

727.

Diversity jurisdiction in *Scott-Pontzer* cases is a subject that has divided the Northern District of Ohio. Seven Judges of the Northern District of Ohio have held that the direct action proviso operates to destroy diversity. *Reese v. Fidelity & Guaranty Ins. Underwriters, Inc.*, No. 1:01CV2633 (N.D. Ohio Mar. 22, 2002) (Oliver, J.) (App. G, pp. 47a-64a); *Butler v. Zurich Am. Ins. Co.*, 184 F.Supp.2d 695 (N.D. Ohio 2002) (Katz, J.); *Stubbins v. Nationwide Agribusiness Ins. Co.*, 181 F.Supp.2d 805 (N.D. Ohio 2002) (Carr, J.); *Estate of Jason Monahan v. Am. States Ins. Co.*, No. 5:00CV1191 (N.D. Ohio Dec. 20, 2001) (Economus, J.) (App. H, pp. 65a-72a); *Comella v. St. Paul Mercury Ins. Co.*, 177 F.Supp.2d 704 (N.D. Ohio 2001), *appeal dismissed*, 2002 U.S. App. LEXIS 5206 (6th Cir. Mar. 26, 2002) (O'Malley, J.); *Kohus v. Hartford Ins. Co.*, No. 1:01CV1179 (N.D. Ohio Nov. 19, 2001) ("If this case is considered a direct action against Hartford it will be a citizen of both Connecticut and Ohio because Hartford's insured, Plainville Ready Mix Concrete, Inc., is an Ohio corporation[.]") (Matia, C.J.) (App. I, pp. 76a, 73a-79a); *Gooden v. National Union Fire Ins. Co.*, No. 5:01CV2138 (N.D. Ohio Nov. 14, 2001) (Polster, J.) (App. J, pp. 80a-81a); *Rogers v. Kohler II*, No. 1:01CV851, (N.D. Ohio Nov. 2, 2001) (ordering the defendants to show cause why the District Court has jurisdiction) (O'Malley, J.) (App. K, pp. 82a-84a); *Kormanik v. St. Paul Fire & Marine Ins. Co.*, No. 5:01CV02122, 2001 U.S. Dist. LEXIS 23929 (N.D. Ohio Oct. 19, 2001) (Polster, J.) (App. D, pp. 12a-17a).

All these decisions are based to some degree upon on the Sixth Circuit's holding in *Ford Motor Co. v. Insurance Co. of North America*, 669 F.2d 421, 425 (6th Cir. 1982), where it was held that "if [the language of the direct action proviso]

encompasses other situations, we should not limit application of the amendment to the specific conditions which gave it birth. The language of the amendment is inclusive rather than exclusive[.]" This expansive interpretation of the direct action proviso has itself engendered a conflict between the Circuits. The Second Circuit has, after quoting a portion of the above passage, stated that "we decline to adopt this expansive reading of the phrase 'direct action.'" *Rosa v. Allstate Ins. Co.*, 981 F.2d 669, 647 (2nd Cir. 1992).

On the other hand, six judges in the Northern District of Ohio have held that the direct action proviso is inapplicable where a putative insured is seeking uninsured motorists coverage from an employer's insurer. *Johnson v. Fireman's Fund Ins. Co.*, No. 1:01CV1063 (N.D. Ohio Jan. 15, 2002) (Nugent, J.) (App. L, pp. 85a-95a); *Fidelity & Guaranty Ins. Underwriters, Inc., v. Nocero*, No. 1:01CV397 (N.D. Ohio Dec. 13, 2001) ("A direct action under § 1332(c)(1) does not include an action brought by an insurer against a claimed insured for declaratory judgment as to the parties' rights and responsibilities under the UM/UIM provisions contained in a policy issued to the claimed insured's employer.... This Court is aware of, but respectfully disagrees with, the opinions issued in [*Kohus* and *Kormanik*]") (Gaughan, J.) (App. M, pp. 114a, 115a n.14, 96a-118a); *Lepley v. Hartford Accident & Indemn. Co.*,174 F.Supp.2d 656 (N.D. Ohio 2001) (finding, apparently, that the direct action proviso does not destroy diversity—the Court had earlier ordered the issue of the application of the direct action proviso briefed) (Gwin, J.); *Martin v. Liberty Mut. Ins. Co.*, No. 5:00CV1864 (N.D. Ohio Nov. 27, 2001) (Dowd, J.) (App. N, pp. 119a-120a); *Bliss v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 1:01CV2046 (N.D. Ohio Nov. 1, 2001) (holding that "National Union filed a memorandum of law in response to the [show cause] order, in which National Union

argues that complete diversity of citizenship exists. (Docket No. 9). The Court is satisfied that cause has been shown why this case should not be remanded.") (Wells, J.) (App. O, pp. 121a-122a); *Redmon v. Sumitomo Marine Management (U.S.A.), Inc.*, 179 F.Supp.2d 787 (N.D. Ohio 2001) (Aldrich, J.).

Although all of the decisions in the Northern District of Ohio that find the direct action proviso applicable have imputed the citizenship of the corporate named insured on its undisputed insurer, one judge has opined that "for the purposes of his *Scott-Pontzer* UIM claim against Chubb, [the plaintiff-employee] is an 'insured' of Chubb; thus pursuant to 28 U.S.C. § 1332(c)(1), it appears that Chubb may be deemed a resident of Ohio [plaintiff-employee's] state of residency." *Rogers, supra,* (App. K at p. 83a). But, two other judges who also have found the direct action proviso generally applicable have taken a different route, concluding only "that diversity of citizenship exists because the Defendants' [corporate named] insured" is of diverse citizenship, and ignoring the citizenship of the plaintiff who claims to be an insured. *Gooden, supra,* (App. J at p. 80a); *Fleshman v. Michigan Mut. Ins. Co.*, No. 1:01CV2389, 2002 U.S. Dist. LEXIS 9991 (N.D. Ohio Apr. 16, 2002). Currently, some judges who find the direct action proviso applicable appear to be in the process of carving out an exception to their own new rule of law—they decline to impute the citizenship of the plaintiff who claims to be an insured upon his or her putative insurer. The reason cited for this apparently contradictory and illogical distinction is that this would simply "carry [*Scott-Pontzer*] too far." *Dolly*, 2002 U.S. Dist LEXIS 9036, at *10; *Fellows-Knox v. Genesis Ins. Co.*, No. 4:01CV1929, 2002 U.S. Dist. LEXIS 8257, at *9 (N.D. Ohio Mar. 18, 2002). Again, the District Court has utilized public policy rather than law to delimit its subject matter jurisdiction.

The error of applying the direct action proviso to actions where the plaintiff is suing his or her own alleged carrier is patently obvious and creates a "new and murky jurisdictional quagmire[.]" *Villa*, 2002 U.S. Dist. LEXIS 9992, at *1 n.1. The issue presented in virtually all actions based upon *Scott-Pontzer* (or in any other action seeking coverage) is whether the plaintiff is an insured. Thus, logically, if the plaintiff wins the case by being found to be an insured of the defendant-insurer, plaintiff would also succeed, perforce, in creating another state of residence for the insurer and in destroying the subject matter jurisdiction of the District Court. This result is unavoidable because, if the direct action proviso applies, the citizenship of the putative insured (plaintiff) is imputed to the insurer (defendant).

Congress never intended such application of the direct action proviso. The direct action proviso was intended to apply only to "certain tort claims in which both parties are local residents, but which, under a State 'direct action' statute, may be brought directly against a foreign insurance carrier without joining the local tort-feasor as a defendant." H.R. Rep. No. 88-1229, at 1 (1964); S.Rep. No. 88-1308, at 1 (1964). Congress indicated an intent to remove from federal jurisdiction only "tort cases involving only local residents, which in the other States [,other than Louisiana and Wisconsin, which have 'direct action statues,'] would come within the exclusive jurisdiction of the State courts." H.R. Rep. No. 88-1229, at 2. Its application to coverage disputes between insurer and putative insured was never envisaged or intended.

Thus, this Court should grant the Petition to address this conflict before insurers—and plaintiffs—across the country are expelled from the federal courts en masse in routine actions between an insured, or a putative insured, and an insurer. The

emerging line of decisions in the Northern District of Ohio represents a fundamental change in the law of diversity jurisdiction and a break with the universally accepted interpretation of 28 U.S.C. § 1332(c)(1). Further, as a simple matter of fairness and justice under Equal Protection and Due Process principles, insurers should not be deprived of access to the federal courts in one District of the United States by the random draw of one judge rather than another and then be informed that the remand order is never reviewable. The uniform application of the law is a policy favored by the framers of the Constitution and the basis of diversity jurisdiction itself.

The far-ranging implications of this issue are not difficult to imagine. Consider the AIDS patent suing a health insurer seeking coverage of a new and promising treatment or procedure. He or she resides in an area where local prejudice is strongly held against AIDS victims, as they are viewed as generally homosexual. Thus, he or she wishes to proceed in federal court. However, if uninsured/underinsured motorist coverage—which provides coverage for injuries sustained by an insured due to another's negligence—is "liability" insurance, so too is health insurance. The court in *Butler*, 184 F.Supp.2d at 699, has already held as much: "'[l]iability insurance is that form of insurance by which the insured is indemnified against loss or liability on account of bodily injuries sustained by others, ... or in a broader sense, against *loss* or liability *on account of injuries* to property ...."' *Id.*, quoting *Aetna Casualty & Surety Ins. Co. v. Greene*, 606 F.2d 123, 126 (6th Cir. 1979) (emphasis added).

The AIDS patent would thus be denied his or her right to proceed in federal court because he or she is pursuing a "direct action" against his or her insurer on a contract of

"liability" insurance. The unintended and potential repercussions of the District Court's decision can be recounted hypothetically for many more pages, but the point is clear—the District Court's order and the Sixth Circuit' declination to review have far-ranging consequences. The Petition should be granted.

IV. Certiorari should be granted to resolve the conflict between the Circuits as to whether one has a constitutional or solely statutory right to proceed in a Court of the United States where such jurisdiction is vested by Congress.

Federal avers that it has a constitutional right to have its case tried by a court of the United States because diversity jurisdiction flows from the Constitution. There currently exist disparate holdings of this Court and conflicting holdings of the Circuit Courts on this issue. *Terral v. Burke Construction*, 257 U.S. 529, 532 (1922) (recognizing the existence of a "constitutional right to resort to the federal courts[.]"); *Bondurant v. Watson*, 103 U.S. 281, 287 (1880) ("No reason is perceived why a party to such a controversy should not enjoy his constitutional right of having his case tried by a court of the United States."). *Contra, Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922).

The judicial power under Article III, Section 1 of the United States Constitution "shall be vested in one supreme Court, and in such other inferior Courts as the Congress may from time to time ordain and establish." The scope of the judicial power which "shall" be vested is set forth in Article III, Section 2, Clause 1 of the United States Constitution: "The judicial Power shall extend ... to Controversies ... between Citizens of different States[.]" Here, while Congress has vested the power to hear a case between citizens of different states in

the District Court, the power so vested originates in the Constitution, not with Congress. "[F]ederal courts 'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not.'" *Quackenbush*, 517 U.S. 706, 716, quoting *Cohens v. Virginia*, 19 U.S. 264 (1821).

This issue—whether the lower federal courts derive their power from Constitutional grant or act of Congress, once jurisdiction has been vested by Congress—remains long unresolved. In *Martin v. Hunter's Lessee*, 14 U.S. 304, 338, (1816), Justice Story stated that "[t]he judicial power is delegated by the constitution in the most general terms, and may, therefore, be exercised by congress under every variety of form, of appellate or original jurisdiction." More recently, in *Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992), this Court quoted *Cary v. Curtis*, 44 U.S. 236, 245 (1845), wherein this Court stated "that 'the judicial power of the United States, although it has its origin in the Constitution, is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress[.]'" In *Kline*, 260 U.S. at 234, however, this Court held that "[e]very [court other than the Supreme Court] created by the general government derives its jurisdiction wholly from the authority of Congress."

Thus, a conflict exists as to whether the jurisdiction of the lower federal courts "has its origin in the Constitution" or is derived "wholly from the authority of Congress," and hence whether, as this Court stated in *Terral*, 257 U.S. at 532, one has a "constitutional right to resort to the federal courts[.]" This has engendered confusion and disparate opinions from the lower courts. *See, e.g., Steckel v. Lurie,* 185 F.2d 921, 924 (6th Cir. 1950), *cert. denied*, 340 U.S. 953 (1951) ("[T]he district courts are not courts of general jurisdiction but . . . their jurisdiction is limited and their powers lie dormant until jurisdiction is

conferred by the Congress under *its* constitutional authority[.]") (emphases added.); *Mason v. Hitchcook,* 108 F.2d 134, 135 (1st Cir. 1939) (Stating that one "cannot . . . come into the District Court under the direct authority of the Constitution."); *Farrell v. Waterman S.S. Co.*, 291 F. 604, 610 (S.D. Ala. 1923) ("Congress merely creates the courts and divides or distributes the constitutional powers among them."). Based on the forgoing precedent of this Court, Federal avers that once jurisdiction was conferred by Congress, it flows from the Constitution, and accordingly, Federal's constitutional rights were violated by the District Court's remand order and the Sixth Circuit's declination of review.

The Constitutional import of diversity jurisdiction is beyond debate. The framer's intent is manifestly apparent. As this Court has held, diversity jurisdiction

> was introduced into the American Constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies ... between citizens of different states.

Bank of the United States v. Deveaux, 9 U.S. 61, 87 (1809). The basis of diversity jurisdiction, created by the Constitution, is thus intertwined with Due Process and Equal Protection

principles. Such jurisdiction is set forth in the Constitution to afford litigants a fair and unbiased hearing and equal protection under the law. Further, local prejudice to insurers in Ohio is more than theoretical. In misapplying the language of 28 U.S.C. § 1332(c)(1) and in finding that it lacked jurisdiction, the District Court violated not only Federal's right under the Constitution to proceed in a court of the United States, but also Federal's rights to Equal Protection and Due Process. The Circuit Court's limited review and analysis of the basis of the District Court's remand order represents a further deprivation of Federal's rights.

Finally, the question may be asked, cannot Congress define the citizenship of a corporation as it sees fit? The answer is two-fold and presents another issue which should be addressed by this Court: (1) first, as Congress has legislatively provided for diversity jurisdiction in this case, the District Court has simply, in conflict with other federal courts, misinterpreted and misapplied the statute; and (2) second, in finding a lack of diversity, the District Court imputed the citizenship of Federal's named insured, which has no interest in this action, upon Federal, whereas, the Constitution mandates that only the citizenship of parties with an interest in the matter in "controversy" be considered. The first issue will not be further belabored. The second requires this Court to consider its former decision on diversity jurisdiction under the Louisiana "direct action" statute. As previously mentioned, the direct action proviso was enacted to mitigate the effect of Louisiana's "direct action" statute by deeming the insurer's citizenship to be the same as its insured's. This is permissible because it is the insured tortfeasor's liability that is part of the matter in "controversy." *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 51 (1954) (honoring that state's characterization "of the real party in interest in federal litigation" while noting that proof of

the tortfeasor's negligence is required). However, here, the District Court considered the citizenship of a wholly disinterested party to the "controversy" in finding a lack of diversity. The citizenship of Federal's named insured—American Electric Power—was the basis of the District Court's finding of a lack of diversity. (App. B at p. 7a.) The named insured, however, will under no circumstance be liable for the uninsured/underinsured motorist benefits plaintiff seeks from Federal—such a claim arises only under the contract and only against Federal, not its named insured. The District Court recognized this fact, stating that this "is a direct action against the insurer of a company that was not even involved in the accident." (App. B at p. 7a and App. D at p. 16a.)

These jurisdictional issues remain unresolved. This Court should now pass upon them to clarify the law and provide guidance to the Circuits on these issues. Whether diversity jurisdiction is a statutory or Constitutional right where jurisdiction is vested by Congress but flows from the Constitution, whether Due Process and Equal Protection rights flow from the Constitutional presumption of local prejudice, and whether the citizenship of totally disinterested parties may be considered in determining diversity, all present issues awaiting resolution by this Court. Further, there are conflicts among the decisions of this Court and between the Circuits and District Courts on these issues; the Petition for Writ of Certiorari should be granted.

CONCLUSION

If clearly erroneous remand orders are allowed to stand with no possibility of review, District Courts may clear their dockets, just as the court in *Thermtron* did, based upon perceived policy, but evade appellate review by simply citing a

jurisdictional statute as the basis of such policy. This result removes the Constitutional protection against local prejudice and should not be endorsed. The saddest epitaph which can be carved in memory of a vanished right is that it was lost because those who possessed it failed to stretch forth a saving hand while yet there was time. *Associated Press v. N.L.R.B.*, 301 U.S. 103, 141 (1937) (Sutherland, J., dissenting).

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

D John Travis
(*Counsel of Record*)
Alan M. Petrov
Robert H. Eddy
Gallagher, Sharp, Fulton
& Norman
1501 Euclid Avenue
7th Floor, Bulkley Building
Cleveland, Ohio 44115
(216) 241-5310 - Telephone
(216) 241-1608 - Telefax
Attorneys for Petitioner.

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

FEDERAL INSURANCE COMPANY,

Petitioner,

v.

KENNETH R. JONES, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

D John Travis
(*Counsel of Record*)
Alan M. Petrov
Robert H. Eddy
Richard C.O. Rezie
Gallagher, Sharp, Fulton & Norman
1501 Euclid Avenue
7th Floor, Bulkley Building
Cleveland, Ohio 44115
(216) 241-5310
Attorneys for Petitioner.

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APPENDIX C - *Verhovec v. Wausau Ins. Co.*, No. 5:01CV662 (N.D. Ohio Nov. 14, 2001) (ECF No. 36) [The order of remand entered by the United States District Court for the Northern District of Ohio, apparently intended for another action.] 8a

APPENDIX D - *Jones v. Federal Ins. Co.*, No. 5:01CV1616 (N.D. Ohio Oct. 22, 2001) (ECF No. 29) (ordering Federal to show cause why the District Court has jurisdiction, with *Kormanik v. St. Paul Fire & Marine Ins. Co.*, No. 5:01CV02122, 2001 U.S. Dist. LEXIS 23929 (N.D. Ohio Oct. 19, 2001) attached) 10a

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APPENDIX A

[Filed March 26, 2002]
[Leonard Green, Clerk]

No. 01-4323

UNITED STATES COURT OF APPEALS
FOR THE SIXTH DISTRICT

KENNETH R. JONES; MARY B. JONES,

Plaintiffs-Appellees,

v.

FEDERAL INSURANCE COMPANY;

Defendant-Appellant,

AMERICAN MOTORISTS INSURANCE COMPANY;
ENERGY INSURANCE (BERMUDA), LTD.,

Defendants.

[NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION
Sixth Circuit Rule 28(g) limits citation
to specific situations. Please see
Rule 28(g) before citing in a
proceeding in a court in the Sixth
Circuit. If cited, a copy must be served
on other parties and the Court.
This notice is to be prominently
displayed if this decision is reproduced]

Before: NORRIS, BATCHELDER, and CLAY, Circuit Judges.

ORDER

Kenneth Jones was injured in a collision with an automobile while he was riding his motorcycle. He and his wife sued the insurers of their employers in an Ohio court. To the extent their injuries were not compensated by other sources, the plaintiffs sought underinsured motorist coverage under the terms of policies issued to their employers. The authority for such an action arguably flows from *Scott-Pontzer v. Liberty Mutual Fire Ins. Co.*, 85 Ohio St.3d 660 (1999). That case held that in the absence of a specific clause to the contrary, an employee could recover under the uninsured/underinsured motorist coverage of his employer's insurance policy regardless of whether he was acting within the scope of employment at the time of injury.

One of the defendants to the suit, Federal Insurance Company, filed a notice of removal to federal district court on grounds of diversity jurisdiction. After removal, the district court issued an order noting that it appeared Federal must be deemed a citizen of Ohio pursuant to 28 U.S.C. § 1332(c)(1). The court directed the defendant to show cause why the case should not be remanded to the state court for lack of jurisdiction.

Upon consideration, the district court concluded that complete diversity was lacking. Section 1332(c)(1) provides in part that "in any direct action against the insurer of a policy or contract of liability insurance . . . to which the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen." The district court relied upon its reasoning in an opinion issued in *Kormanik v. St. Paul Fire and Marine Ins. Co.*, No. 01 CV2122 (N.D. Ohio, Oct. 19, 2001), in which it had held that actions

brought pursuant to the *Scott-Pontzer* authority are direct actions within the meaning of § 1332(c)(1). Applying § 1332(c)(1) to the instant action, the district court concluded that one of the defendant's insureds was a citizen of Ohio and that therefore diversity was lacking.

The defendant appealed the district court's decision. Now the plaintiffs move to dismiss this appeal on grounds that the order is not reviewable. The defendant responds in opposition to the motion, and the plaintiffs reply in support.

Review of an order remanding a case to the state court from which it was removed is generally barred by 28 U.S.C. § 1447(d), which provides in part that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . . " This statute does not bar review of all remand orders. Rather, "only remands based on grounds specified in [28 U.S.C.] § 1447(c) are immune from review under § 1447(d)." *Quackenbush v. Allstate Ins. Co.*., 517 U.S. 706, 711-12 (1996) (citations omitted). Those grounds include a lack of subject matter jurisdiction.

Although the district court clearly found an absence of diversity jurisdiction in the instant case, the defendant argues that the district court's decision was something other than a determination of jurisdiction. The conclusion that this case constitutes a direct action under § 1332(c)(1), argues the defendant, is a reviewable nonjurisdictional determination. The defendant suggests that a policy decision has been made similar to that in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). In *Thermtron*, a basis for federal jurisdiction over the removed action had been shown, but the district court nonetheless remanded the case out of concern for an overburdened docket. Because the remand was not based on one of the grounds of § 1447(c), the Court held that it was

reviewable. The defendant suggests that a similar policy determination has been made in the instant case because the district court has concluded that a *Scott-Pontzer* action does not belong in federal court. However, unlike *Thermtron*, the district court has applied a jurisdictional statute to the facts presented. The legal holding with which the defendant takes issue was in the context of the larger jurisdictional determination.

This court has recognized that a remand order may be reviewed if it is "based on a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction." *Anusbigian v. Trugreen/Chemlawn, Inc.*, 72 F.3d 1253, 1256 (6th Cir. 1996), *citing Regis Associates v. Rank Hotels (Management) Ltd.*, 894 F.2d 193, 194-95 (6th Cir. 1990). But when the issue sought to be appealed is subsumed into the jurisdictional decision, it is not independently appealable. *Anusbigian*, 72 F.3d at 1256 (if district court determines that it lacks subject matter jurisdiction over a removed case and for that reason remands it, the court of appeals lacks jurisdiction); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1343-49 (6th Cir. 1993) (where district court makes a decision that is necessary for determining whether the court has subject matter jurisdiction, the decision falls within the scope of § 1447(d)'s prohibition); *State of Ohio v. Wright*, 922 F.2d 616, 619-20 (6th Cir. 1993) (where question of removal jurisdiction was the heart of the decision, fact that district court had to examine plausibility of federal defense did not confer jurisdiction upon the court of appeals). In the instant case, the district court's holding was one of jurisdiction. Therefore, it is not reviewable.

The defendant also suggests that this court retains jurisdiction because issues of constitutional dimension are presented. It relies primarily upon *In re TMI Litigation*, 940 F.2d 832 (3d Cir. 1991), where the district court held unconstitutional a statute that conferred federal jurisdiction. We

do not believe that *TMI* compels review where, as here, the court has applied a federal jurisdictional statute and found jurisdiction wanting, nor do we believe the defendant has asserted constitutional arguments of such a magnitude that would warrant ignoring the prohibition of § 1447(d).

The motion to dismiss this appeal hereby is GRANTED.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:01CV1616

KENNETH R. JONES, et al.,

Plaintiffs,

vs.

FEDERAL INSURANCE CO., et al.

Defendants.

JUDGE: DAN AARON POLSTER

MEMORANDUM OF OPINION AND ORDER

On May 30, 2001, Plaintiffs, Kenneth R. Jones and Mary B. Jones filed a Complaint in the Stark County Court of Common Pleas against Defendants Federal Insurance Company ("Federal Insurance") and American Motorists Insurance Company. Plaintiffs' Complaint arises out of a March 27, 1999 accident which occurred when a negligent driver struck Kenneth Jones as he was riding his motorcycle. Plaintiffs allege that they are insureds under their employers' uninsured/underinsured motorist insurance policies (*see, e.g., Scott-Pontzer v. Liberty Mutual Fire Ins. Co.*, 85 Ohio St.3d 660 (1999))and that the defendant insurers breached their contracts of insurance and acted in bad faith.

On July 2, 2001, Defendant Federal Insurance removed

the case to this Court pursuant to 28 U.S.C. § 1332 (diversity jurisdiction). (ECF No. 1). On September 18, 2001, Plaintiffs filed an Amended Complaint (ECF No. 20) which added a third insurer, Energy Insurance (Bermuda, Ltd., to the case.

On October 19, 2001, the Court issued an opinion in *Kormanik v. St. Paul Fire and Marine Ins. Co.* (Case No. 5:01CV2122), remanding a *Scott-Pontzer* case for lack of jurisdiction. On October 22, 2001, the Court issued a Show Cause Order (ECF No. 29) which attached the *Kormanik* opinion and required Federal Insurance to explain why this case should not also be remanded. On November 1, 2001, Federal Insurance filed a response (ECF No. 32) to the Court's Show Cause Order. On November 5, 2001, Plaintiffs filed a Memorandum in Opposition (ECF No. 33) to Federal Insurance's response.

Having reviewed the parties' briefs, the Court finds that this case must be remanded for the same reasons stated in the *Kormanik* opinion. Although the defendant insurers are located in New Jersey, Illinois, and the Bahamas, at least one of the insureds, American Electric Power Co., Inc., is a citizen of Ohio. Because Plaintiffs are also citizens of Ohio, diversity jurisdiction is lacking.

For the reasons stated above, the Court hereby Orders that the above-captioned case be remanded to the Stark County Court of Common Pleas.

IT IS SO ORDERED.

S/Dan Aaron Polster 11/14/01
Dan Aaron Polster
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:01CV662

PHYLLIS VERHOVEC, *et al.*,

Plaintiffs,

vs.

WAUSAU INSURANCE CO., *et al.*

Defendants.

JUDGE: DAN AARON POLSTER

ORDER OF REMAND

For the reasons stated in the Memorandum Opinion and Order filed contemporaneously with this entry of judgment, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is hereby **ORDERED, ADJUDGED and DECREED** that the above-entitled action is remanded to the Court of Common Pleas of Tuscarawas County, Ohio, the state court from which it was removed.

A certified copy of this Order of Remand shall be mailed by the Clerk of the United States District Court for the Northern District of Ohio to the Clerk of the Tuscarawas County, Ohio, Court of Common Pleas.

IT IS SO ORDERED.

S/Dan Aaron Polster 11/14/01
Dan Aaron Polster
United States District Judge

APPENDIX D

POLSTER, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:01cv1616

KENNETH R. JONES, ET AL.,

Plaintiff(s),

v.

FEDERAL INSURANCE CO., ET AL.,

Defendant(s).

ORDER

On July 2, 2001, Defendant Federal Insurance Company removed the above-captioned case to this Court pursuant to 28 U.S.C. § 1441(a). (ECF No. 1). Defendant contends that this Court has diversity jurisdiction over the case because Plaintiffs are citizens of Ohio, Defendant is a citizen of New Jersey, and the amount in controversy exceeds $75,000. It appears to the Court that, pursuant to 28 U.S.C. § 1332(c)(1), the defendant is deemed a citizen of Ohio. Since complete diversity does not exist, the Court does not have jurisdiction over the matter. Attached is a recent memorandum of opinion and order in another case addressing the issue.

Defendant Federal Insurance Company is hereby ordered to show cause in writing, within 10 days upon receipt of this order, why this case should not be remanded for lack of

jurisdiction.

IT IS SO ORDERED.

/s/Dan Aaron Polster 10/22/01
Dan Aaron Polster
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:01CV02122

ELLA LOUISE KORMANIK, ADMIN., et al.,

Plaintiffs,

v.

ST. PAUL FIRE AND MARINE INS. CO., et al.

Defendants.

JUDGE: DAN AARON POLSTER

MEMORANDUM OF OPINION AND ORDER

Before this Court is Plaintiffs' Motion to Remand Case to Summit County Court of Common Pleas (ECF No. 11). For the reasons stated below, Plaintiffs' motion is **GRANTED.**

I. BACKGROUND

On August 3, 2001, Plaintiffs filed a wrongful death and survivorship action against Defendant St. Paul Fire and Marine Insurance Company in the Summit County Court of Common Pleas. (ECF No. 1, Ex. A). In the Complaint, Plaintiffs allege that on August 3, 1999, Amie Kormanik, who was the daughter of Ella Louise Kormanik, died as a result of an automobile accident. Because the tortfeasors involved in that action were underinsured, Plaintiffs now seek damages from Defendant, the insurer of Ella Louise Kormanik's former employer, pursuant to the Ohio Supreme Court's decision in *Scott-Pontzer v. Liberty*

Mutual Fire and Ins. Co., 85 Ohio St.3d 660 (1999).

On September 5, 2001, Defendant removed the action to this Court pursuant to 28 U.S.C. § 1441(a). (ECF No. 1). Defendant contends that this Court has diversity jurisdiction over the case because Plaintiffs are citizens of Ohio, Defendant is a citizen of Minnesota, and the amount in controversy exceeds $75,000. *Id.* at 2. On October 4, 2001, Plaintiffs filed a Motion to Remand (ECF No. 11), in which they argue that complete diversity does not exist because Defendant is a citizen of both Minnesota and Ohio.

II. LEGAL ANALYSIS

For purposes of diversity jurisdiction, a corporation is a citizen of both its state of incorporation and the state where it has its principal place of business. 28 U.S.C. § 1332(c)(1). When a corporation is an insurer, citizenship also may be predicated upon the citizenship of the insured. According to the express terms of 28 U.S.C. § 1332(c)(1) ("the diversity-limiting provision"):

> [I]n any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

In this case, the only named defendant is St. Paul Fire and Marine Insurance Company. Defendant's insured, W.G. Lockhart Construction Company, is an Ohio corporation with its

principal place of business in Ohio. Thus, if the provision quoted above applies to this case, Defendant must be deemed a citizen of Ohio and diversity will be lacking.

Defendant argues that the provision does not apply because this case is not a "direct action" within the meaning of the statute. In support of its position, Defendant points to *Henderson v. Selective Ins. Co.*, 369 F.2d 143 (6th Cir. 1966) and *Stockton v. General Accident Ins. Co.* 897 F.2d 530, unpublished (6th Cir. 1990). In *Henderson*, the Sixth Circuit held that the diversity-limiting provision did not apply in a case brought by judgment creditors of a negligent driver against insurers for an automobile salesman and an automobile dealership that allowed the negligent driver to drive one of the dealership's vehicles. The court based its decision upon legislative history indicating that the provision had been enacted solely for the purpose of addressing ". . . a situation arising in the States of Wisconsin and Louisiana, as a result of the enactment of 'direct action' statutes in those states permitting suits directly against the insurance companies without joining the insured." *Id.* at 149.

In *Stockton v. General Accident Ins. Co.*, the Sixth Circuit held that a garnishment lawsuit brought by judgment creditors against an insurer was not a direct action for purposes of § 1332(c). 897 F.2d 530. The court found that a "direct action" for purposes of § 1332(c), is "an action that under applicable state law may be brought directly against the insurer by the tort claimant prior to entry of any judgment against the alleged tortfeasor." *Id.* at *3. Based upon this definition, the court concluded that the lawsuit before it was not a direct action because a valid judgment against the insured tortfeasors was a prerequisite to any garnishment action by the plaintiffs against the insurer. *Id.*

The Court finds that neither of the above cases requires a finding that the diversity-limiting provision does not apply in this case. In *Henderson*, the Sixth Circuit explicitly recognized that the provision was adopted in an effort to address the increasing case burden faced by federal courts as the result of state laws which created diversity where it would not have existed before. *Henderson*, 369 F.2d at 149. The Sixth Circuit's decision in *Ford Motor Co. v. Insurance Co. of North America*, 669 F.2d 421 (6th Cir. 1982), further expanded upon this view. In that case, the Sixth Circuit held that the diversity-limiting provision of § 1332(c) stripped the district court of diversity jurisdiction over an action filed by a plaintiff directly against an insurer pursuant to Michigan's no- fault insurance statute. The court noted that although it had initially given a narrow reading to the diversity-limiting provision, its application should not be limited "to the specific conditions which gave it birth." *Id.* at 425. The court concluded that the no-fault suits against insurers pursuant to the Michigan statute constituted "direct actions" within the meaning of § 1332(c) because they resulted in the same type of "back-door diversity" that the provision was intended to prevent. *Id.* at 426.

Much like the "direct action" statutes enacted by the legislatures in Wisconsin and Louisiana and Michigan's no-fault insurance statute, the *Scott-Pontzer* line of cases has resulted in a burgeoning number of cases that would not otherwise have fallen within the diversity jurisdiction of the federal courts. Thus, the same policy reasons that prompted the addition of the diversity restricting provision to § 1332(c) in the first place apply with equal force to *Scott-Pontzer* actions. Furthermore, the unsettled nature of the law surrounding such actions frequently leaves district courts in the difficult position of attempting to guess how the Ohio Supreme Court would rule given a particular set of circumstances. It makes far more sense for a state court to address these unsettled issues because then

the Ohio Supreme Court would have an opportunity to correc any errors that might be made.

The Sixth Circuit's decision in *Stockton* is no determinative because it involved an entirely different type o action. *Stockton* concerned an attempt by plaintiffs wh obtained default judgments against two tortfeasors to collect o those judgments by filing a separate lawsuit against th tortfeasors' insurer. 897 F.2d 530. This case is not a collectio or garnishment action based upon a previous judgment agains a tortfeasor. Rather, as is permitted by *Scott-Pontzer* and it progeny, it is a direct action against the insurer of a compan that was not even involved in the accident. Such actions do no require a prior entry of judgment against the tortfeasor[1] an therefore do not fall outside of the Sixth Circuit's definition o a "direct action."

III. CONCLUSION

For the reasons stated above, the Court finds that the above-captioned suit is a "direct action" against an insure within the meaning of 28 U.S.C. § 1332(c). Because Defendan is a citizen of both Minnesota and Ohio, complete diversity does not exist and the Court is without jurisdiction over the case. Accordingly, Plaintiffs' Motion to Remand Case to Summi County Court of Common Pleas (ECF No. 11) is **GRANTED**.

---

[1] An allegation that the tortfeasor either has no insurance or has insurance insufficient to cover the Plaintiff's injuries will suffice.

BEST AVAILABLE COPY

IT IS SO ORDERED.

S/Dan Aaron Polster 10/19/01
Dan Aaron Polster
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:01CV02122

ELLA LOUISE KORMANIK, ADMIN., et al.,

Plaintiffs,

v.

ST. PAUL FIRE AND MARINE INS. CO., et al.

Defendants.

JUDGE: DAN AARON POLSTER

ORDER OF REMAND

For the reasons stated in the Memorandum Opinion and Order filed contemporaneously with this entry of judgment, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is hereby **ORDERED, ADJUDGED and DECREED** that the above-entitled action is remanded to the Court of Common Pleas of Summit County, Ohio, the state court from which it was removed.

A certified copy of this Order of Remand shall be mailed by the Clerk of the United States District Court for the Northern District of Ohio to the Clerk of the Summit County, Ohio, Court of Common Pleas.

IT IS SO ORDERED.

S/Dan Aaron Polster 10/19/01
Dan Aaron Polster
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Case No. 5:01CV1616

KENNETH R. JONES
13571 Sousa St.
N. Lawrence, Ohio 44666

and

MARY B. JONES
13571 Sousa St.
N. Lawrence, Ohio 44666

Plaintiffs,

v.

FEDERAL INSURANCE CO.,
Part of the Chubb Group of Insurance Companies
15 Mountain View Road
Warren, NJ 07059

and

AMERICAN MOTORISTS INSURANCE COMPANY
1 Kemper Drive
Long Grove, IL 60049-0001

and

ENERGY INSURANCE (BERMUDA), LTD.
c/o H&H Park International Limited
Attn: Martyn Svensen
P.O. Box HM 2064
Hamilton HM HX, Bermuda

Defendants.

JUDGE: POLSTER

AMENDED COMPLAINT: BREACH OF CONTRACT; BAD FAITH

JURY DEMAND ENDORSED HEREON

Plaintiffs, Kenneth Jones and Mary Jones ("Plaintiffs"), for their Complaint against Defendants, Federal Insurance Company, Part of the Chubb Group of Insurance Companies ("Federal"), American Motorists Insurance Co. ("American"), and Energy Insurance (Bermuda), Ltd. ("Energy") state as follows:

GENERAL ALLEGATIONS

1. Plaintiffs are residents of the State of Ohio and are currently domiciled at 13571 Sousa Street, North Lawrence, Stark County, Ohio 44666.

2. Upon information and belief, Federal is an insurance company regularly doing business in Stark County, Ohio.

3. Upon information and belief, American is an insurance company regularly doing business in Stark County, Ohio.

4. Upon information and belief, Energy is an insurance company regularly doing business in Stark County, Ohio.

5. On March 27, 1999, Plaintiff Kenneth Jones was involved in an automobile collision in which another driver negligently failed to yield the right of way to Mr. Jones and struck Mr. Jones as he was operating his motorcycle.

6. As a result of the collision, Mr. Jones was forced to have his left foot, ankle and calf amputated, resulting in substantial medical bills and expenses, tremendous pain and suffering, and lost wages and lost earning capacity.

7. Plaintiff Mary Jones has been damaged through the loss of Kenneth Jones' society, companionship, and consortium.

8. Plaintiffs are insureds under Federal insurance policies 3710-62-62 ERG and/or 7320-04-14 and prior policies with respect to the aforementioned automobile collision.

9. The Federal insurance policy was issued to American Electric Power Co., Inc.

10. At all times relevant herein, Plaintiff Kenneth Jones was an employee of American Electric Power Co., Inc.

11. Plaintiffs are insureds under American insurance policy 3MG 0786199-01 and prior policies, as well as policy 3SX12433l-00, with respect to the aforementioned automobile collision.

12. The American insurance policies were issued to The M. K. Morse Co.

13. At all times relevant herein, Plaintiff Mary Jones was

an employee of The M. K. Morse Co.

FIRST CAUSE OF ACTION -BREACH OF CONTRACT UNINSURED MOTORISTS BENEFITS

14. Plaintiffs restate the allegations contained in paragraphs 1 through 13 as if fully rewritten herein.

15. All premium payments due to American on all insurance policies were timely paid, and American provided a policy which was in effect on March 27, 1999, the date of the aforementioned automobile collision.

16. Plaintiffs are insureds under American insurance policy 3MG 0786199-01 and prior policies, as well as policy 3SXI24331-00, with respect to the aforementioned automobile collision.

17. American is required to provide coverage to Plaintiffs under the Ohio Revised Code and under applicable Ohio Supreme Court Authority.

18. American's motor vehicle liability policies must either offer underinsured or uninsured motorist coverage for the protection of their insureds or such coverage arises by operation of law.

19. Counsel for Plaintiffs have demanded American to provide underinsured motorist coverage to Plaintiffs for any injuries that would not be compensable under the tortfeasor's liability insurance policy.

20. American has denied uninsured/underinsured motorists coverage for the March 27, 1999 collision, thereby materially breaching the contract of insurance Plaintiffs hold

with American.

21. As a direct and proximate result of American's breach of contract, Plaintiffs are entitled to compensatory damages in excess of Twenty-five Thousand Dollars ($25,000).

SECOND CAUSE OF ACTION -BAD FAITH

22. Plaintiffs restate the allegations contained in paragraph 1 through 21 as if fully rewritten herein.

23. Despite demand for payment, American has unreasonably and unlawfully failed and refused to provide uninsured/underinsured motorist coverage to Plaintiffs.

24. The actions of American in failing and refusing to provide coverage of any claims in this matter is in bad faith, entitling Plaintiffs to an award of compensatory and punitive damages, in excess of One Hundred Thousand Dollars ($100,000).

THIRD CAUSE OF ACTION -BREACH OF CONTRACT UNINSURED MOTORISTS BENEFITS

25. Plaintiffs restate the allegations contained in paragraphs 1 through 24 as if fully rewritten herein.

26. All premium payments due to Federal on all insurance policies, were timely paid, and Federal provided a policy which was in effect on March 27, 1999, the date of the aforementioned automobile collision.

27. Plaintiffs are insureds under Federal insurance policy 3710-62-62 ERG and prior policies with respect to the aforementioned automobile collision.

28. Federal is required to provide coverage to Plaintiffs under the Ohio Revised Code and under applicable Ohio Supreme Court Authority.

29. Federal's motor vehicle liability policies must either offer underinsured or uninsured motorist coverage for the protection of their insureds or such coverage arises by operation of law.

30. Counsel for Plaintiffs have demanded Federal to provide underinsured motorist coverage to Plaintiffs for any injuries that would not be compensable under the tortfeasor's liability insurance policy.

31. Federal has denied uninsured/underinsured motorists coverage for the March 27, 1999 collision, thereby materially breaching the contract of insurance Plaintiffs hold with Federal.

32. As a direct and proximate result of Federal's breach of contract, Plaintiffs are entitled to compensatory damages in excess of Twenty-five Thousand Dollars ($25,000).

FOURTH CAUSE OF ACTION -UNINSURED MOTORISTS BENEFITS

33. Plaintiffs restate the allegations contained in paragraph 1 through 32 as if fully rewritten herein.

34. All premium payments due to Energy on all insurance policies, were timely paid, and Energy provided a policy which was in effect on March 27, 1999, the date of the aforementioned automobile collision.

35. Plaintiffs are insureds under Energy Insurance policy

3SXl24331-00 and prior policies with respect to the aforementioned automobile collision.

36. Energy is required to provide coverage to Plaintiffs under the Ohio Revised Code and under applicable Ohio Supreme Court Authority.

37. Energy's motor vehicle liability policies must either offer underinsured or uninsured motorist coverage for the protection of their insureds or such coverage arises by operation of law.

38. Counsel for Plaintiffs have demanded Energy to provide underinsured motorist coverage to Plaintiffs for any injuries that would not be compensable under the tortfeasor's liability insurance policy.

39. Plaintiffs are entitled to uninsured/underinsured motorists coverage from Energy in an amount in excess of Twenty-five Thousand and no/100 Dollars ($25,000.00).

WHEREFORE, Plaintiffs, Kenneth R. Jones and Mary B. Jones, demand judgment against Defendants, Federal Insurance Company, Part of the Chubb Group of Insurance Companies, American Motorists Insurance Co., and Energy Insurance (Bermuda) Ltd., jointly and severally as follows:

(i) For compensatory damages in excess of Twenty-five Thousand Dollars ($25,000);

(ii) For punitive damages in excess of One Hundred Thousand Dollars ($100,000);

(iii) For their attorney's fees expended in seeking coverage under Plaintiffs' policies of insurance

with Federal and American;

(iv) For their costs incurred herein; and

(v) For such other and further relief as this Court deems just and equitable.

Respectfully submitted,
BLACK, MCCUSKEY, SOUERS & ARBAUGH

By: */s/ Robert E. Soles. Jr.*
Robert E. Soles, Jr. (#0046707)
John L. Juergensen (#0071071)
1000 United Bank Plaza
220 Market Avenue South
Canton, Ohio 44702
Telephone: (330) 456-8341
Telefax: (330) 456-5756
bsoles@bmsa.com
Counsel for Plaintiffs
Kenneth and Mary Jones

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

/s/ Robert E. Soles. Jr.
Robert E. Soles, Jr.

INSTRUCTIONS FOR SERVICE

TO THE CLERK:

Please serve the above-named defendants with a summons and a copy of the foregoing complaint by certified mail, return receipt requested, at the addresses listed in the caption of this complaint.

/s/ Robert E. Soles
Jr. Robert E. Soles, Jr.

APPENDIX F

[Filed 01 Jul-2, PM 2:55
(illegible) Court
Northern District of Ohio
Cleveland]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5:01CV1616

KENNETH R. JONES, et al.,

Plaintiffs,
v.

FEDERAL INSURANCE COMPANY, et al.,

Defendants.

JUDGE: POLSTER
MAG. JUDGE GALLAS

NOTICE OF REMOVAL OF CIVIL ACTION

Defendant Federal Insurance Company, improperly denominated as Chubb Insurance Company (hereinafter "Federal Insurance Company"), gives notice to this Court, pursuant to 28 U.S.C. §1441, of the removal of Case No. 2001 CV 01440, now pending in the Court of Common Pleas, Stark County, Ohio. Removal to this Court is proper for the reasons set forth below.

1. Defendant, Federal Insurance Company, is presently a defendant in a civil action in the Court of Common Pleas , Stark County, Ohio, Case No. 2001 CV 01440 entitled Kenneth R. Jones, et al., v. Federal Insurance Company, et al. The Complaint and summons served on Federal Insurance Company on June 5, 2001 are attached hereto as Exhibit "A."

2. This case was initially filed on or about May 30, 2001. The two Defendants to the original Complaint are Federal Insurance Company and American Motorists Insurance Company.

3. This Notice of Removal is being filed within thirty (30) days from the receipt of the summons and Complaint from which it could first be ascertained that this case became and is removable. It is, therefore, timely filed pursuant to 28 U.S.C. §1446(b).

4. Upon information and belief, the Plaintiffs, Kenneth R. Jones and Mary B. Jones are residents of Stark County in the State of Ohio.

5. Defendant, Federal Insurance Company, is incorporated in Indiana, with its principal place of business in Warren, New Jersey. Defendant Federal Insurance Company is not a citizen of the State of Ohio under 28 U.S.C. §1332(d).

6. Defendant, American Motorist Insurance Company, is incorporated in Indiana with its principal place of business in Indiana. Defendant American Motorist Insurance Company is not a citizen of the State of Ohio under 28 U.S.C. § 1332(d).

7. Defendant, American Motorist Insurance Company consents to the removal of this action by Federal Insurance

Company.

8. The Plaintiffs have asserted claims for alleged loss of a foot sustained as a result of an injury sustained by Plaintiff Kenneth R. Jones on or about March 27, 1999. Plaintiffs are also alleging bad faith. The policy limits under said Policy are in excess of $75,000. Because Plaintiffs' damages allegedly exceed $75,000.00, the amount in controversy requirement necessary for this Court's exercise of jurisdiction is met. 28 U.S.C. §1332(a) (as amended effective January 17, 1997) Gaffold v. General Electric Company, 997 F.2d 150, 158 through 161 (6th Cir. 1993).

9. The United States District Court has jurisdiction over the civil action pursuant to 28 U.S.C. § 1332(a) as a matter in controversy exceeds the value of $75,000.00, exclusive of interest and costs.

10. A copy of this Notice of Removal has been filed with the appropriate state court pursuant to 28 U.S.C. §1446(d).

11. No bond is being filed as such former requirement was abolished by the Judicial Improvements and Access to Justice Act of 1988 (Pub. L. No.100-702), which became law on November 19, 1988.

WHEREFORE, Defendant, Federal Insurance Company hereby removes this action from the Court of Common Pleas, Stark County, Ohio to this Honorable Court.

Respectfully submitted,

OF COUNSEL:
GALLAGHER, SHARP,
FULTON & NORMAN

s/ D John Travis
D JOHN TRAVIS (0011247)
DAVID PAUL BRADLEY (0041966)
1501 Euclid Avenue
Seventh Floor - Bulkley Building
Cleveland, Ohio 44115-2108
Phone: (216) 241-5310
Fax: (216) 241-1608
E-mail: Djt@gsfn.com, Dpb@gsfn.com
Attorneys for Defendant
Federal Insurance Co.

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Removal of Civil Action has been sent by regular United States mail this 2 day of July 2001 to:

Robert E. Soles, Jr., Esq.
Brian L. Metz, Esq.
1000 United Bank Plaza
220 Market Avenue South
Canton, Ohio 44702

Attorney for Plaintiffs

Ronald A. Rispo, Esq.
Weston Hurd Fallon Paisley
& Howley L.L.P.
2500 Terminal Tower
50 Public Square
Cleveland, Ohio 44113-2241

Attorney for Defendant
American Motorists
Insurance Company

s/ D John Travis

D JOHN TRAVIS (0011247)
DAVID PAUL BRADLEY (0041966)
Attorneys for Defendant
Federal Insurance Company

PHIL G. GIAVASIS
STARK COUNTY CLERK OF COURTS

KENNETH R. JONES, ET AL.
PLAINTIFF.
VS. CASE NUMBER: 2001CV01440
ASSIGNED JUDGE:
CHARLES EDWIN BROWN

FEDERAL INSURANCE COMPANY
PART OF THE CHUBB GROUP OF
INSURANCE COMPANIES, ET AL.

DEFENDANT.

SUMMONS

May 31, 2001

TO THE FOLLOWING NAMED DEFENDANT:
FEDERAL INSURANCE COMPANY PART
OF THE CHUBB GROUP OF INSURANCE
COMPANIES

15 MOUNTAIN VIEW RD
WARRENC, NJ 07059

YOU HAVE BEEN NAMED A DEFENDANT IN A COMPLAINT FILED IN STARK COUNTY COURT OF COMMON PLEAS, STARK COUNTY COURT HOUSE, CANTON, OHIO 44702 BY:

KENNETH JONES -
13571 SOUSA ST
N LAWRENCE, OH 44666 PLAINTIFF.

A COPY OF THE COMPLAINT IS ATTACHED HERETO. THE NAME AND ADDRESS OF THE PLAINTIFF'S ATTORNEY IS:

Robert Soles, Jr.
1000 United Bank Plaza
220 Market Avenue South
Canton, OH 44702

YOU ARE HEREBY SUMMONED AND REQUIRED TO SERVE UPON THE PLAINTIFF'S ATTORNEY, OR UPON THE PLAINTIFF, IF HE HAS NO ATTORNEY OF RECORD, A COPY OF AN ANSWER TO THE COMPLAINT WITHIN TWENTY-EIGHT DAYS AFTER THE SERVICE OF THIS SUMMONS ON YOU, EXCLUSIVE OF THE DAY OF SERVICE. YOUR ANSWER MUST BE FILED WITH THE COURT WITHIN THREE DAYS AFTER THE SERVICE OF A COPY OF THE ANSWER ON THE PLAINTIFF'S ATTORNEY.

IF YOU FAIL TO APPEAR AND DEFEND, JUDGMENT BY DEFAULT WILL BE RENDERED AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.

PHIL G. GIAVASIS
CLERK OF COURTS
STARK COUNTY, OHIO

BY: s/ D. Bennett Deputy Clerk

[Marked as Exhibit A]

[Filed
May 30, 2001
Phil G. Giavasis
Stark County Ohio
Clerk of Courts]

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

Case No.: 2001 CVO 1440

KENNETH R. JONES
13571 Sousa St.
N. Lawrence, Ohio 44666

and

MARY B. JONES
13571 Sousa St.
N. Lawrence, Ohio 44666

Plaintiffs,

v.

FEDERAL INSURANCE COMPANY,
Part of the Chubb Group of Insurance
Companies
15 Mountain View Road
Warren, NJ 07059

and

AMERICAN MOTORISTS INSURANCE
COMPANY
1 Kemper Drive
Long Grove, IL 60049-0001

Defendants.

COMPLAINT
BREACH OF CONTRACT
AND BAD FAITH

JURY DEMAND ENDORSED HEREON

Judge: Brown

Plaintiffs, Kenneth Jones and Mary Jones ("Plaintiffs"), for their Complaint against Defendants, Federal Insurance Company, part of the Chubb Group of Insurance Companies ("Federal") and American Motorists Insurance Co. ("American"), state as follows:

GENERAL ALLEGATIONS

1. Plaintiffs are residents of the State of Ohio and are currently domiciled at 13571 Sousa Street, North Lawrence, Stark County, Ohio 44666.

2. Upon information and belief, Federal is an insurance company regularly doing business in Stark County, Ohio.

3. Upon information and belief, American is an insurance company regularly doing business in Stark County, Ohio.

4. On March 27, 1999, Plaintiff Kenneth Jones was involved in an automobile collision in which another driver negligently failed to yield the right of way to Mr. Jones and struck Mr. Jones as he was operating his motorcycle.

5. As a result of the collision, Mr. Jones was forced to have his left foot, ankle and calf amputated, resulting in substantial medical bills and expenses, immense pain and suffering and lost wages and lost earning capacity.

6. Plaintiff Mary Jones has been damaged through the loss of Kenneth Jones' society, companionship and consortium.

7. Plaintiffs are insureds under Federal insurance policies 3710-62-62 ERG and/or 7320-04-14 and prior policies with respect to an automobile collision that occurred on March 27, 1999 and in which Mr. Jones was seriously injured.

8. The Federal insurance policy was issued to American Electric Power Co., Inc.

9. At all times relevant herein, Plaintiff Kenneth Jones was an employee of American Electric Power, Co., Inc.

10. Plaintiffs are insureds under American insurance policy 3MG 0786199-01 and prior policies with respect to an automobile collision that occurred on March 27, 1999 and in which Mr. Jones was seriously injured.

11. The American insurance policy was issued to The M.K. Morse Co.

12. At all times relevant herein, Plaintiff Mary Jones was an employee of The M.K. Morse Co.

FIRST CAUSE OF ACTION
BREACH OF CONTRACT
Uninsured Motorists Benefits

13. Plaintiffs restate the allegations contained in paragraphs 1 through 12 as if fully rewritten herein.

14. All premium payments due to American on all insurance policies, were timely paid, and American provided a policy which was in effect on March 27, 1999, the date of the automobile collision in which Mr. Jones was injured.

15. Plaintiffs are insureds under American insurance policy, 3MG 0786199-01 and prior policies with respect to an automobile collision that occurred on March 27, 1999 and in which Mr. Jones was seriously injured.

16. American is required to provide coverage to Plaintiffs under the Ohio Revised Code and under applicable Ohio Supreme Court Authority, which require all motor vehicle liability policies to offer underinsured or uninsured coverage to provide protection for their insureds or such coverage arises by operation of law.

17. Counsel for Plaintiffs have demanded American to provide underinsured motorist coverage to Plaintiffs for any injuries that would not be compensable under the tortfeasor's liability insurance policy.

18. American has denied uninsured/underinsured motorists coverage for the March 27, 1999 collision, thereby materially breaching the contract of insurance Plaintiffs hold with American.

19. As a direct and proximate result of American's breach of contract, Plaintiffs are entitled to compensatory damages in excess of Twenty-five Thousand Dollars ($25,000).

SECOND CAUSE OF ACTION
BAD FAITH

20. Plaintiffs restate the allegations contained in paragraph 1 through 19 is if fully rewritten herein.

21. Despite demand for payment, American has unreasonably and unlawfully failed and refused to provide uninsured/underinsured motorist coverage to Plaintiffs.

22. The actions of American in failing and refusing to provide coverage of any claims in this matter is in bad faith, entitling Plaintiffs to an award of compensatory and punitive damages, in excess of One Hundred Thousand Dollars ($100,000).

THIRD CAUSE OF ACTION
BREACH OF CONTRACT
Uninsured Motorists Benefits

23. Plaintiffs restate the allegations contained in paragraphs 1 through 22 as if fully rewritten herein.

24. All premium payments due to Federal on all insurance policies, were timely paid, and Federal provided a policy which was in effect on March 27, 1999, the date of the automobile collision in which Mr. Jones was injured.

25. Plaintiffs are insureds under Federal insurance policy 3710-62-62 ERG and prior policies with respect to an automobile collision that occurred on March 27, 19999 and in

which Mr. Jones was seriously injured.

26. Federal is required to provide coverage to Plaintiffs under the Ohio Revised Code and under applicable Ohio Supreme Court Authority, which require all motor vehicle liability policies to offer underinsured or uninsured motorist coverage to provide protection for their insureds or such coverage arises by operation of law.

27. Counsel for Plaintiffs have demanded Federal to provide underinsured motorist coverage to Plaintiffs for any injuries that would not be compensable under the tortfeasor's liability insurance policy.

28. Federal has denied uninsured/underinsured motorist coverage for the March 27, 1999 collision, thereby materially breaching the contract of insurance Plaintiffs hold with Federal.

29. As a direct and proximate result of Federal's breach of contract, Plaintiffs are entitled to compensatory damages in excess of Twenty-five Thousand Dollars ($25,000).

FOURTH CAUSE OF ACTION
BAD FAITH

30. Plaintiffs restate the allegations contained in paragraph 1 through 29 as if fully rewritten herein.

31. Despite demand for payment, Federal has unreasonably and unlawfully failed and refused to provide uninsured/underinsured motorist coverage to Plaintiffs.

32. The actions of Federal in failing and refusing to provide coverage of any claims in this matter is in bad faith,

entitling Plaintiffs to an award of compensatory and punitive damages, in excess of One Hundred Thousand Dollars ($100,000).

WHEREFORE, Plaintiffs, Kenneth R. Jones and Mary B. Jones, demand judgment against Defendants, Federal Insurance Company, part of the Chubb Group of Insurance Companies and American Motorists Insurance Co., jointly and severally as follows:

(A) For compensatory damages in excess of Twenty-five Thousand Dollars ($25,000);

(B) For punitive damages in excess of One Hundred Thousand Dollars ($100,000);

(C) For their attorney's fees expended in seeking coverage under Plaintiffs' policies of insurance with Federal and American;

(D) For their costs incurred herein; and

(E) For such other and further relief as this Court deems just and equitable.

Respectfully submitted,
BLACK, MCCUSKEY, SOLES & ARBAUGH

By: s/ Robert E. Soles, Jr.
Robert E. Soles, Jr. (#0046707)
Brian L. Metz (#0070943)
1000 United Bank Plaza
220 Market Avenue South
Canton, Ohio 44702
Telephone: (330) 456-8341
Telefax: (330) 456-5756
Counsel for Plaintiffs
Kenneth and Mary Jones

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable

s/ Robert E. Soles, Jr.
Robert E. Soles, Jr.

INSTRUCTIONS FOR SERVICE

TO THE CLERK:

Please serve the above-named defendants with a summons and a copy of the foregoing complaint by certified mail, return receipt requested, at the addresses listed in the caption of this complaint.

s/ Robert E. Soles, Jr.
Robert E. Soles, Jr.

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

Case No. 2001 CV 01440

KENNETH R. JONES, et al.,

Plaintiffs,

v.

FEDERAL INSURANCE COMPANY, et al.,

Defendants.

JUDGE BROWN

NOTICE OF FILING OF REMOVAL
TO THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO

The court and plaintiffs are hereby notified that the defendant has filed a Notice of Removal with the United States District Court for the Northern District of Ohio on the 2nd day of July, 2001. With this filing, the action now stands removed from the Court of Common Pleas, Stark County, Ohio, to the United States District Court for the Northern District of Ohio, Eastern Division. A copy of the Notice of Removal is attached and incorporated herein as Exhibit A.

Respectfully submitted,

OF COUNSEL:
GALLAGHER, SHARP,
FULTON & NORMAN

s/ D John Travis
D JOHN TRAVIS (0011247)
DAVID PAUL BRADLEY (0041966)
1501 Euclid Avenue
Seventh Floor - Bulkley Building
Cleveland, Ohio 44115-2108
Phone: (216) 241-5310
Fax: (216) 241-1608
E-mail: Djt@gsfn.com, Dpb@gsfn.com
Attorneys for Defendant
Federal Insurance Co.

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Filing of Removal to the United States District Court, Northern District of Ohio has been sent by regular United States mail this 2 day of July 2001 to:

Robert E. Soles, Jr., Esq.
Brian L. Metz, Esq.
1000 United Bank Plaza
220 Market Avenue South
Canton, Ohio 44702

Attorney for Plaintiffs

Ronald A. Rispo, Esq.
Weston Hurd Fallon Paisley
& Howley L.L.P.
2500 Terminal Tower
50 Public Square
Cleveland, Ohio 44113-2241

**Attorney for Defendant
American Motorists
Insurance Company**

s/ D John Travis

D JOHN TRAVIS (0011247)
DAVID PAUL BRADLEY (0041966)
Attorneys for Defendant
Federal Insurance Company

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01 CV 2633

ROBERT REESE, *et al.*,

Plaintiffs

v.

FIDELITY & GUARANTY INSURANCE UNDERWRITERS, INC.,

Defendant

JUDGE SOLOMON OLIVER, JR.

ORDER

Robert and Renee Reese ("Plaintiffs") filed this suit on October 16, 2001, against Defendant Fidelity & Guaranty Insurance Underwriters Incorporated ("Fidelity") in the Cuyahoga County Court of Common Pleas. Fidelity timely removed the action to this court on November 20, 2001, based on diversity of citizenship. On November 28, 2001, Plaintiffs filed a Motion to Remand (ECF No. 6). For the reasons stated herein, the Motion is granted.

I. BACKGROUND

Plaintiffs allege that, on or about June 7, 1997, Renee and her son, Austin Reese, were injured by a hit-and-run

motorist. The accident caused Austin serious and permanent physical and mental injuries. Because the tortfeasor was uninsured or underinsured, Plaintiffs sued in state court, seeking uninsured/underinsured motorist ("UM/UIM") coverage from Fidelity on the basis that Plaintiffs are insureds pursuant to Renee Reese's employer's policy with Fidelity. Her employer is Sarcom, Inc. ("Sarcom").

Plaintiffs' claim against Defendant is based on the Ohio Supreme Court case *Scott-Pontzer v. Liberty Mutual Fire Ins. Co.*, 85 Ohio St.3d 660 (1999). *Scott-Pontzer* examines the scope of Ohio Revised Code § 3937.18, the section which establishes UM/UIM coverage requirements in Ohio. In *Scott-Pontzer*, the Ohio Supreme Court found that absent express rejection or other agreement between the insured business and the insurer, a business is presumed, by operation of law, to possess UM/UIM automobile coverage and the business insured's employees also receive the UM/UIM automobile coverage. *Scott-Pontzer*, 85 Ohio St.3d at 665-666. Pursuant to *Scott-Pontzer*, Plaintiffs argue that under the policy held between Sarcom and Fidelity, they are eligible to obtain UM/UIM coverage.

II. DISCUSSION

Here, this court is asked to determine whether Plaintiffs' motion to remand should be granted because diversity jurisdiction does not exist pursuant to 28 U.S.C. § 1332. In order for a court to possess diversity of citizenship jurisdiction, all parties must be completely diverse, i.e., if any defendant is deemed to have the same citizenship as that of any plaintiff, diversity is destroyed. *See Caudill v. N. Am. Media Corp.*, 200 F.3d 914, 916 (6th Cir. 2000).

A corporation is a citizen of any state where it has been

incorporated and of the state where it has its principal place of business. 20 U.S.C. § 1332(c). Fidelity is a citizen of the State of Wisconsin and West Virginia. Plaintiffs are citizens of the State of Ohio. There is no dispute regarding these facts. Considered on these facts alone, there would be diversity of citizenship jurisdiction. However, the issue presented to this court is whether § 1332(c)(1) requires this court to consider Defendant Fidelity to be a citizen of the state of which its insured, Sarcom, is a citizen, i.e., Ohio. If it does, there would be no diversity of citizenship jurisdiction.

Section 1332(c)(1) states:

> In any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well a any State by which the insurer has been incorporated and of the State where it has its principal place of business.

Plaintiffs argue that their *Scott-Pontzer* type claim is a "direct action" against the insurer, Fidelity, pursuant to "a policy or contract of liability insurance" to which the insured, Sarcom, is not joined as a party-defendant. Therefore, Fidelity is deemed to be a citizen of the state of which Sarcom is a citizen. As a consequence, this case should be remanded back to state court. In support of their argument, Plaintiffs cite the following recent decisions of the court: *Kormanik v. St. Paul Fire and Marine Ins. Co.*, slip op., case no. 5:01-CV-2122 (Oct. 19, 2001) (Polster, J.), *Kohus v. Hartford Ins. Co.*, slip op., case no. 1:01-CV-1179 (Nov. 19, 2001) (Matia, J.), *Comella v. St. Paul Mercury Ins. Co.*, 1:00-CV-2664, 2001 WL 1597996 (N.D.

Ohio Dec. 11, 2001) (O'Malley, Jr.) and *Carcioppolo v. CHUBB Group of Ins. Co.*, slip op., case no. 1:00-CV-2988 (Dec. 11, 2001) (O'Malley, J.).

Fidelity argues that the above cases are wrongly decided and that the majority of the cases analyzing the scope of 28 U.S.C. § 1332(c)(1) construe the provision more narrowly than the courts in the above-cited cases. It argues that: (A) § 1332(c)(1) does not destroy diversity in the *Scott-Pontzer* line of cases because: (1) the situations involved therein do not constitute a "direct action" within the meaning of 28 U.S.C. § 1332(c)(1); and (2) the Fidelity policy, under which Plaintiffs seek to recover, does not constitute a "liability insurance" policy within the meaning of 28 U.S.C. § 1332(c)(1); (B) pursuant to *Gooden v. National Fire Insurance Company*, slip op., case no. 5:01CV2138, this court should decline to remand; and (C) if § 1332(c)(1) is found to be applicable, and this case is remanded back to state court, its constitutional rights under the Due Process and Equal Protection Clauses of the Fifth Amendment to the Constitution of the United States would be violated, and that such a limit on this court's jurisdiction violates Article III, Section 2 of the United States Constitution.

(A) Whether § 1332(c)(1) Destroys in *Scott-Pontzer* Actions?

(1) Whether the "Direct Action" Exception of § 1332(c)(1) is Applicable to *Scott-Pontzer* Actions?

Fidelity urges this court to find that the "direct action" exception under § 1332(c)(1) destroys diversity only where suit is brought against the tortfeasor's insurer without first obtaining judgment against the tortfeasor himself. Therefore, because this *Scott-Pontzer* action is a suit by a tort victim against an insurer who is unrelated to the tortfeasor, this matter does not qualify as

a "direct action." For the reasons stated herein, the court does not find this position to be well taken.

28 U.S.C. § 1332(c)(1) was drafted by Congress to address laws that had been enacted in Louisiana and Wisconsin. *Northbrook Nat'l Ins. Co. v. Brewer*, 493 U.S. 6, 10 (1989). These direct action laws permitted:

> one claiming injury at the hands of another who was covered by liability insurance to sue the liability insurance carrier rather than the alleged wrongdoer. Thus even where the plaintiff and the alleged tortfeasor were residents of the same state, if the liability insurer was a citizen of a different state, diversity jurisdiction could be asserted in such a direct action.

Ford Motor Co. v. Ins. Co. N. America, 669 F.2d 421, 424 (6th Cir. 1982). Because the Louisiana and Wisconsin laws "resulted in a flood of essentially local lawsuits clogging already crowded district court dockets," Congress drafted § 1332(c)(1) to "cloak[] the nonresident insurer with the citizenship of its insured [in order to] remove the basis of diversity jurisdiction." *Id.*

Immediately following the enactment of § 1332(c)(1), many courts, including the Sixth Circuit, narrowly interpreted it, indicating, albeit *in dicta*, that it might be applied only in the particular circumstances which prompted Congress to draft the provision. *Id.* (citing *Henderson v. Selective Ins. Co.*, 369 F.2d 143 (6th Cir. 1966); *White v. United States Fidelity & Guaranty Co.*, 356 F.2d 746, 747-48 (1st Cir. 1966); *Inman v. MFA Mutual Ins. Co.*, 264 F. Supp. 727 (E.D. Ark. 1967); *Walker v. Firemans Fund Ins. Co.*, 260 F. Supp. 95 (D. Mont. 1966); *Carvin v. Standard Accidental Ins. Co.*, 253 F. Supp. 232 (E.D.

Tenn. 1966), *aff'd on merits without discussion of jurisdiction*, 395 F.2d 326 (6th Cir. 1968)). For example, in *Henderson*, the Sixth Circuit found that the provision did not apply to an action brought by judgment creditors of a negligent driver against insurers of an automobile dealer and automobile salesman who allowed the negligent driver to drive one of the dealership's vehicles. *Id.* at 149. The court reasoned that because § 1332(c)(1) was enacted to address the situations arising in the States of Wisconsin and Louisiana where "the enactment of 'direct action' statutes in those states permitt[ed] suits directly against the insurance companies without joining the insured," it could not apply to an action brought by a judgment creditor against an insurer. *Id.* In general, these early cases focused on the specific circumstances which gave rise to § 1332(c)(1) and then concluded that the action was not a "direct action" within the meaning of § 1332(c)(1) or that the provision was inapplicable because the insurance involved was not "liability insurance." *Ford*, 669 F.2d at 424.

More recently, however, the Sixth Circuit as well as other courts have recognized that the terms in § 1332(c)(1) should be interpreted "more broadly." *Ford*, 669 F.2d at 424 (citing *Aetna Cas. & Surety Ins. Co. v. Greene*, 606 F.2d 123, 126 (6th Cir. 1979)); *Hernandez v. Travelers Ins. Co.*, 489 F.2d 721 (5th Cir.), *cert. denied*, 419 U.S. 844 (1974); *O.M. Greene Livestock Co. v. Azalea Meats, Inc.*, 516 F.2d 509 (5th Cir. 1975); *Torres v. Hartford Ins. Co.*, 588 F.2d 848 (1st Cir. 1978); *See, e.g., Stockton v. General Accident Ins. Co.*, No. 89-5492, 1990 WL 20477, *3 (6th Cir. March 6, 1990).

In *Aetna Casualty & Surety Insurance Company* and *Ford*, the Sixth Circuit found that the reach of §1332(c)(1) should be extended beyond the factual circumstances which served as its impetus, in large part, because the language of § 1332(c)(1) was "inclusive," *Ford*, 669 F.2d at 425, and because

"Congress, when it used the terms 'direct action' and 'liability insurance' in the amendment to § 1332(c) did not intend the amendment to apply only to traditional tort claims." *Aetna Cas. & Surety Ins. Co.*, 606 F.3d at 126. In applying this more liberal interpretation, the Sixth Circuit found that § 1332(c)(1) applied to actions brought pursuant to no-fault statutes, *see Ford*, 669 F.2d at 425 (citing *McMurray v. Prudential Property & Cas. Ins. Co.*, 458 F. Supp. 209 (E.D. Mich. 1978)), as well as to actions brought pursuant to workers' compensation laws. *See Aetna Casualty & Surety Ins. Co.*, 606 F.2d at 126.

In *Aetna Casualty & Surety Insurance Company*, the Sixth Circuit found that Tennessee's workers' compensation law involved the type of "direct action" procedure "that Congress intended to regulate through § 1332(c)(1)." *Id.* at 125. The Sixth Circuit concluded that because Tennessee's workers' compensation law "provide[d] for 'direct actions' by injured residents against out-of-state insurance carriers," it fell within the ambit of the meaning of the provision's term "direct action." *Id.* at 125-126.

In *Ford*, the Sixth Circuit found that Michigan's no-fault statute involved the type of "direct action" procedure that § 1332(c)(1) was intended to regulate. In *Ford*, the State of Michigan had abolished tort liability arising from the ownership, maintenance or use of a motor vehicle in Michigan. *Id.* at 425. It provided, in its place, "personal protection benefits" and "property protection benefits" to help those injured or those suffering property damage originating from the ownership, maintenance or use of automobiles. *Id.* Those benefits were provided on a no-fault basis rather than on the basis of traditional tort liability. *Id.* While acknowledging that no-fault statutes had not existed at the time § 1332(c)(1) was drafted, the Sixth Circuit found that no-fault insurance operated "in exactly the same way as the Louisiana and Wisconsin direct action

statutes." *Id.* Michigan's no-fault statute permitted "a person claiming injury or damage arising from the ownership or use of a motor vehicle to sue directly the insurer rather than the owner or operator of the vehicle." *Id.* As such, no-fault actions were direct actions within the meaning of § 1332(c)(1). The Sixth Circuit concluded that if § 1332(c)(1) did not apply:

> the same 'back door diversity' which Congress eliminated by the 1964 amendment would be possible under no-fault. No-fault represents a latter-day attempt by the states to improve the mechanism for recovery by those injured and damaged in accidents arising out of the use of motor vehicles. Given Congress' reaction to earlier state legislation which permitted direct actions, no-fault should not be held to expand the jurisdiction of federal courts.

Id.

The *Ford* opinion is replete with language indicating that the term "direct action" should be interpreted broadly, including the following: "when [Congress] used the term 'direct action'[] . . . in the amendment to § 1332(c), [it] did not intend the amendment to apply only to traditional tort claims,'" *Ford*, 669 F.2d at 424 (citing *Aetna Cas. & Surety Ins. Co.*, 606 F.2d at 126), "the language of the amendment is inclusive rather than exclusive," *Id.* at 425, and "we should not limit application of the amendment to the specific conditions which gave it birth," *Id.* This language leads this court to conclude that it must interpret terms of § 1332(c)(1) broadly where "the same 'back door diversity' which Congress eliminated by the 1964 amendment would" result if it did not act otherwise. *Id.*

This conclusion does not change upon examination of

the Sixth Circuit's most recent discussion of "direct action." *Stockton v. General Accident Insurance Co.*, No. 89-5492, 1990 WL 20477, *3 (6th Cir. March 6, 1990). In this unpublished opinion, the Sixth Circuit defined the term "'direct action,' as used in [§ 1332(c)(1)], [as][] an action that under applicable state law may be brought directly against the insurer by the tort claimant prior to entry of any judgment against the alleged tortfeasor." *Id.* While one could argue this definition was the Sixth Circuit's attempt to limit the application of § 1332(c)(1) to circumstances involving suits against the tortfeasor's insurer, this case does not so hold. Indeed, this definition was not new. It emphasizes the required timing of the lawsuit for purposes of determining the applicability of § 1332(c)(1); it must be brought prior to any judgment being rendered against the tortfeasor. *Stockton* does not limit the application of § 1332(c)(1) to cases involving the insurer of the tortfeasor. Read in this manner, the case is entirely consistent with *Comella v. St. Paul Mercury Ins. Co.*, 1:00-CV-2664, 2001 WL 1597996 (N.D. Ohio Dec. 11, 2001) (O'Malley, J.), *Kormanik v. St. Paul Fire and Marine Ins Co.*, slip op., case no. 5:01-CV-2122 (Oct. 19, 2001) (Polster, J.), *Verhovec v. Wausau Ins. Co.*, slip op., case no. 5:01-CV-662 (Nov. 14, 2001) (Polster, J.); *Kohus v. Hartford Ins. Co.*, slip op., case no. 1:01CV-1179 (Nov. 19, 2001) (Matia, J.); Comella, 2001 WL 1597996, at *4 and *Carcioppolo v. CHUBB Group of Ins. Co.*, slip op., case no. 1:00-CV-2988 (Dec. 11, 2001) (O'Malley, J.). Each of these cases involved plaintiffs bringing actions, pursuant to applicable law, as outlined by the Ohio Supreme Court in *Scott-Pontzer*, against the defendant insurance companies prior to entry of any judgment against the tortfeasor. Thus, these *Scott-Pontzer* cases meet the *Stockton* definition of "direct action" under § 1332(c)(1).

There are striking similarities between those cases the Sixth Circuit has previously found to involve direct actions and *Scott-Pontzer*-type cases. The type of direct action statutes

involved in Wisconsin and Louisiana, the Michigan no-fault statutes involved in *Ford* and the *Scott-Pontzer*-type cases all involve modifications of the traditional tort scheme in favor of providing broader remedies for those injured in motor vehicle accidents. *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660 (1999). Louisiana and Wisconsin's direct action laws and those the Sixth Circuit has found to be "direct actions," such as Michigan's no-fault statute and Tennessee's workers' compensation law, permitted tort claimants to bring direct actions against insurers without joining the insureds or first seeking judgement against the tortfeasor. *Ford*, 669 F.2d at 425; *Aetna Cas. & Surety Ins. Co.*, 606 F.2d at 125. Likewise, the *Scott-Pontzer* line of cases affords a tort claimant the ability to bring a direct action, by operation of law, against an insurer for coverage without joining the third-party insured or requiring the tort claimant to first seek judgment against the tortfeasor. *Comella*, 2001 WL 1597996, at *4. As such, it is consistent with the Sixth Circuit's most recent definition of direct action inasmuch as it involves a tort claimant seeking to bring an action, pursuant to state law, directly against the insurer, to which the insured is not joined as a party defendant, prior to entry of any judgment against the alleged tortfeasor. *See Comella v. St. Paul Mercury Ins. Co.*, 1:00-CV-2664, 2001 WL 1597996, *4 (N.D. Ohio Dec. 11, 2001) (O'Malley, J.) (citing *Stockton v. General Accident Insurance Co.*, No. 89-5492, 1990 WL 20477, *3 (6th Cir. March 6, 1990)). Like the Michigan no-fault statutes, and the Louisiana and Wisconsin direct action statutes, which created "back door diversity" resulting in a "swell" of "essentially local lawsuits" being brought in federal courts, *Aetna Cas. & Surety Ins. Co.*, 606 F.2d at 125; *See also Ford*, 669 F.2d at 424, the Ohio Supreme Court's interpretation of O.R.C. § 3937.18 in *Scott-Pontzer* has created "back door diversity" which has resulted in a surge of these "essentially local lawsuits" in federal district courts. *See Kormanik*, slip op. 4 (*Scott-Pontzer* cases resulted in burgeoning number of cases

in federal courts); *Kohus*, slip op. at 4.

Accordingly, this court finds that the present *Scott-Pontzer* action constitutes a "direct action" within the meaning of § 1332(c)(1).

(2) Whether Fidelity's Policy Falls Within the Meaning of "policy or contract of liability insurance" Under 28 U.S.C. § 1332(c)(1)?

Fidelity argues that § 1332(c)(1) does not apply because:

> "the term 'liability insurance' is applied [only] to contracts which provide for indemnity against liability. . . . Liability insurance is that form of insurance by which the insured is indemnified against loss or liability on account of bodily injuries sustained by others, . . . or in a broader sense, against loss or liability on account of injuries to property . . . A policy of liability insurance is a policy that indemnifies against the condition of becoming liable. . . . "

Aetna Casualty & Surety Ins. Co. v. Greene, 606 F.2d 123, 126 (6th Cir. 1979). Fidelity maintains that inasmuch as the Plaintiffs seek UIM coverage as claimed insureds under the Fidelity policy, and not indemnification against tort liability, Plaintiffs do not seek to recover under their policy as "liability insurance" within the meaning of 28 U.S.C. § 1332(c)(1). *Id.* (citations omitted). This argument is not well taken.

Here, Plaintiffs do not bring suit against Fidelity pursuant to an insurance contract entered into with the insurer. Rather, they bring their action pursuant to state statute which, "as interpreted by the Ohio Supreme Court in *Scott-Pontzer* . .

. [allows] 'a person claiming injury or damage arising from the ownership or use of a motor vehicle to sue [his [or her] employer's] insurer rather than the owner or operator of the vehicle.'" *Comella*, 2001 WL 1597996, *4 (quoting *Ford*, 669 F.2d at 425). As discussed above, the effect caused by the Ohio Supreme Court's statutory interpretation of O.R.C. § 3937.18(A) is similar to that which was caused by the passage of the no-fault statute addressed in *Ford*. Just as the no-fault statute "represent[ed] a latter-day attempt by the state [] to improve the mechanism for recovery by those injured and damaged in accidents arising out of the use of motor vehicles," *Ford*, 669 F.2d at 425-426, the *Scott-Pontzer* line of cases are an attempt to do the same. Inasmuch as the Sixth Circuit found in *Ford* that "'Congress, when it used the term[] . . .'liability insurance', did not intend the amendment to apply only to traditional tort claims,'" *Ford*, 669 F.2d at 424 (citing *Aetna Casualty & Surety Ins. Co.*, 606 F.2d at 126), this court finds that Plaintiffs' claims against Fidelity, pursuant to insurance coverage created, by operation of law, fits the meaning of the language "liability insurance."

Admittedly, the facts in *Ford* are somewhat distinguishable from this case. In *Ford*, the tortfeasor was the insured. Here, the tortfeasor, a hit-and-run driver, is a non-party to the suit and the insured is Plaintiffs' employer. However, this court finds, as did the court in *Comella v. St. Paul Mercury Ins. Co.*, 1:00-CV-2664, 2001 WL 1597996 (N.D. Ohio Dec. 11, 2001), that the logic surrounding the application of § 1332(c)(1) is the same. *Comella*, 2001 WL 1597996 at *5.

In *Comella*, the plaintiffs, husband and wife, brought a *Scott-Pontzer* claim in state court against the insurance companies of the husband's employer for underinsured motorist coverage. The husband had been injured in an automobile accident while he was acting in the scope of his employment.

The individual who caused the accident was underinsured. Plaintiffs brought a breach of contract claim, seeking a determination that they were covered under the policy. After removal of the action, based on diversity jurisdiction, plaintiffs filed a motion to remand based on the ground that § 1332(c)(1) destroyed the court's subject matter jurisdiction. *Comella*, 2001 WL 1597996, at *1.

In finding that the insurance coverage created by operation of law in *Scott-Pontzer* fell within the meaning of "policy or contract of liability insurance," Judge O'Malley stated that:

> in both this case and in *Ford*, it is an artifact of state law that permits a plaintiff to: (a) name an insurance company as a defendant (b) without naming the tortfeasor as a party (c) to recover damages caused by the absent tortfeasor. Thus, in *Ford*, the Michigan no-fault statute allowed the plaintiff (Ford Motor) to sue an insurer (INA) to recover damages caused by the tortfeasor (Refiners), without joining the tortfeasor as a party. *Ford*, 669 F.2d at 422. In this case, Ohio law, by virtue of *Scott-Pontzer* . . ., allows the plaintiff (*Comella*) to sue an insurer (St. Paul and Guaranty National) to recover damages caused by the tortfeasor (Betty Doran), without joining the tortfeasor as a party. Indeed, in both this case and *Ford*, state law makes insurance benefits available to an injured party "[other] than on the basis of traditional tort liability, and actions to secure the[se] benefits may be maintained directly against the insurer of the vehicle rather than the insured." *Id.* at 425. The factual circumstances of this case may be

> different from those of *Ford*, but the logic leading to the application of § 1332(c)(1) is the same.

Comella, 2001 WL 1597996, at *5.

In this *Scott-Pontzer* case, as in *Comella*, "insurance benefits [are made] available to an injured party "[other] than on the basis of traditional tort liability, and actions to secure the[se] benefits may be maintained directly against the insurer of the vehicle rather than the insured." *Comella*, 2001 WL 1597996, at *5 (citing *Ford*, 669 F.2d at 425). Just as the United States Supreme Court in *Northbrook* held in regard to Louisiana and Wisconsin's direct action laws, *Scott-Pontzer* actions do "not come within the spirit of the intent of the basic purpose of the diversity jurisdiction of the Federal judicial system." *Northbrook*, 493 U.S. at 10 (citing S. Rep. No. 1308, at 7, U.S. Code Cong. & Admin. News 2784 (1964)). Although *Ford* may be factually different, the logic leading to the application of § 1332(c)(1) is the same.

(B) Whether This Court Should Decline To Remand Pursuant To *Gooden v. National Fire Insurance Company*?

Fidelity argues that because Plaintiffs seek legal relief, i.e., monetary damages, as well as equitable relief, i.e., a declaration that they should receive UM/UIM benefits, pursuant to Judge Polster's recent opinion in *Gooden v. National Fire Insurance Company*, slip op., case no. 5:01CV2138 (November 14, 2001) (Polster, J.), this court should decline to remand. This argument is not well taken.

In *Gooden*, the plaintiffs were the wife and children of an individual who was killed by a negligent driver. Pursuant to *Scott-Pontzer*, the plaintiffs filed an action for equitable relief in

the form of a declaratory judgment under the Ohio Declaratory Judgment Statute O.R.C. § 2721 in the Stark County Court of Common Pleas against certain liability insurance carriers that had issued liability policies to the decedent's employer. In the same action, the plaintiffs also sought legal relief in the form of a monetary award for breach of contract in the event the state trial court declared coverage was available. Following removal based on diversity jurisdiction, plaintiffs moved the federal court to abstain from exercising jurisdiction or to stay the federal action by remanding the case to state court for resolution. In this opinion, Judge Polster found that Plaintiffs' complaint went "well beyond a mere request for declaratory relief" and therefore ti was "improper for the court to decline to exercise its jurisdiction over the case" by granting the motion to abstain or stay by remand. *Gooden*, slip op., 2.

Gooden is inapposite to this action. Here, Plaintiffs have not asked this court to abstain or stay an action over which it has jurisdiction. Rather, they urge this court to remand the action pursuant to *Kormanik* and its progeny on the ground that under § 1332(c)(1), there is no diversity jurisdiction in this case. Therefore, *Gooden* is not relevant to this court's decision whether to remand.

(C) Fidelity's Constitutional Challenges

Fidelity asserts that this court's decision to remand the present action back to state court violates its due process and equal protection rights under the Fifth Amendment. Moreover, Fidelity argues that the application of § 1332(c)(1) amounts to an unconstitutional limitation of this court's jurisdiction, in violation of Article III, Section 2 of the United States Constitution. This court finds that these arguments are not well taken.

(1) Whether Remand Violates Fidelity's Fifth Amendment Due Process Rights?

Fidelity argues that pursuant to Article III, Section 2 of the United States Constitution, they have a right to proceed with this matter before an impartial federal court and that denial of this right, i.e., remand of this action to a presumptively biased state court, is a denial of its procedural and substantive due process rights.

Article III, section 2 states, in pertinent part, that "[t]he judicial Power [of federal courts] shall [be] extend[ed] . . . to Controversies . . . between Citizens of different States." U.S. Const. art. III § 2. However, in order for jurisdiction to exist, there must not only be constitutional jurisdiction, but statutory jurisdiction as well. *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). It is clear that in several respects, Congress has not chosen to endow trial courts with the whole of diversity jurisdiction permitted by the Constitution. For example, though the Constitution does not impose a monetary limitation on such jurisdiction, the statute, 28 U.S.C. § 1332 provides for jurisdiction over such cases only where the amount in controversy is in excess of $75,000, plus interest and costs. Thus, there is no impediment to Congress limiting diversity jurisdiction as it has done in § 1332(c)(1). Since there is no right to a federal forum under these circumstances, there can be no violation of the right to due process. Furthermore, Fidelity's right to sue generally has not been abridged as it may still sue in state court.

(2) Whether Remand Violates Fidelity's Right to Equal Protection under the Fifth Amendment?

Fidelity argues that the interpretation of § 1332(c)(1) in a manner which supports remand denies them equal protection

under the Fifth Amendment to the United States Constitution. Fidelity's equal protection argument is not well taken. In making this determination, the court applies the rational relationship test; Fidelity has not shown any race or class-based animus, triggering a higher level of scrutiny. *Equality Foundation v. City of Cincinnati*, 128 F. 3d 289, 293 (6th Cir. 1997). In regard to § 1332(c)(1), there is a rational relationship between the denial of diversity jurisdiction in cases such as this one and the objective of Congress to reduce a flood of what would normally be local litigation into federal court. Therefore, there is no violation of Fidelity's rights under the equal protection component of the due process clause of the Fifth Amendment.

(3) Whether Application of § 1332(c)(1) Amounts to an Unconstitutional Limitation of This Court's Jurisdiction in Violation of Article III, Section 2 of the United States Constitution

For the reasons stated in (1) above, there is no violation of the Constitution for Congress' failure to endow the trial courts with the whole of what is jurisdictionally permissible under the Constitution of the United States. Therefore, this court's decision to remand the present matter, pursuant to § 1332(c)(1), a limitation imposed by Congress, is not a violation of Article III, Section 2 of the United States Constitution.

IV. CONCLUSION

Plaintiffs' action pursuant to *Scott-Pontzer* constitutes a "direct action" within the meaning of § 1332(c)(1). Also, the Ohio Supreme Court's statutory interpretation in *Scott-Pontzer* creates insurance coverage, by operation of law, that fits the meaning of the term "liability insurance" under 28 U.S.C. § 1332(c)(1). Since the insurer Fidelity is deemed a citizen of the

same state as its insured, Sarcom, i.e., Ohio and Plaintiffs are also Ohio citizens, there is no diversity of citizenship. Consequently, Plaintiff's Motion to Remand (ECF No. 6) is granted.

IT IS SO ORDERED.

/S/ SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

March 22, 2002

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

Case No. 5:00CV1191

ESTATE OF JASON MONAHAN,

Plaintiff,

v.

AMERICAN STATES INSURANCE CO., et al.

Defendants.

JUDGE: PETER C. ECONOMUS
Dated: December 20, 2001

MEMORANDUM OPINION AND ORDER

This matter is before the Court on *sua sponte* on the issue of subject matter jurisdiction. On November 14, 2001, this Court issued a show cause order instructing the parties to brief the issue of this Court's diversity jurisdiction in light of the Memorandum Opinion and Order issued by Judge Dan Aaron Polster in Kormanek v. St. Paul Fire and Marine Ins. Co., slip op., case no. 01-CV-2122 (October 19, 2001)(Dkt. #15). On November 20, 2001, Plaintiff filed her brief asserting that this Court has diversity jurisdiction over this action (Dkt. #66). On November 30, 2001, Defendants filed a two-page brief adopting the reasoning set forth in Plaintiff's brief.

"Unlike other issues not involving the merits of a case, subject-matter jurisdiction may be raised at any time, by any

party or even *sua sponte* by the court itself." Franzel v. Kerr Mfg. Co., 959 F.2d 628, 630 (6th Cir. 1992); *See* Fed. R. Civ. P. 12(h)(3) ("[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"). Indeed, the issue of whether diversity jurisdiction exists maybe raised *sua sponte* by a court of appeals, after a trial court has already entered judgment. *See* Ford Motor Co. v. Insurance Co. v. N. Am., 669 F.2d 421, 423 (6th Cir. 1982) ("[t]his court raised the jurisdiction issue *sua sponte* at oral argument").

The present action arises out of a motor vehicle accident which occurred on October 25, 1992, in Summit County, Ohio. Jason Monahan ("Monahan") was a passenger in a rented limousine returning home from a high school dance. The limousine was struck by an uninsured driver and Monahan died as a result of the injuries he sustained the accident.

Plaintiff, the administratrix of Monahan's estate, filed a lawsuit against the uninsured driver, the limousine company, and the limousine driver. On October 19, 1999, a jury found in favor of the Plaintiff and against the uninsured driver in the amount of six million dollars ($6,000,000) in compensatory damages and two million dollars ($2,000,000) in punitive damages.

At the time of the accident, Monahan resided with Plaintiff and his step-father[2] and was employed by Exchange Printing ("Exchange"). Exchange had, in effect, two American States Insurance commercial liability policies: an Economy Package Policy (American Economy policy number 02-CC-

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[2] Plaintiff collected thirty thousand dollars ($30,000) from a family UM/UIM insurance policy.

147652 ("the Economy policy")), and a Super-Shield Umbrella Liability Policy (American States policy number 01-SU-080373 ("the Umbrella Policy" or, collectively, "the Exchange policies")).

Each Exchange policy included a form which undertook to offer uninsured/underinsured ("UM/UIM") coverage. The forms reflect that Exchange selected twenty-five thousand dollars ($25,000) in UM/UIM coverage under the Economy policy, and rejected UM/UIM coverage entirely under the Umbrella policy.

On May 10, 2000, Plaintiff filed the present action against Defendants, American States Insurance Company and American Economy Insurance Company[3], alleging that Monahan is entitled to UM coverage under the Exchange policies. Plaintiff contends that Monohan is an "insured" under his employer's commercial policies pursuant to the Supreme Court of Ohio's mandate in Scott-Pontzer v. Liberty Mut. Fire Ins. Co., 85 Ohio St.3d 660 (1999). Jurisdiction in this matter was predicated upon complete diversity of the parties.

In Kormanik, the Court analyzed 28 U.S.C. § 1332(c)(1), which addresses this Court's diversity jurisdiction in certain cases involving insurance companies. Specifically the statute states:

> In any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant,

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[3] Safeco, a third defendant, was voluntarily dismissed with prejudice on March 22, 2001 (Dkt/ #50)

> such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as any state by which the insurer has been incorporated and of the State where it has its principle place of business.

The immediate purpose of the 1964 amendment to s 1332(c) was made clear in the legislative history. Louisiana and Wisconsin had enacted laws permitting one claiming injury at the hands of another who was covered by liability insurance to sue the liability insurance carrier rather than the alleged wrongdoer. Thus even where the plaintiff and the alleged tortfeasor were residents of the same state, if the liability insurer was a citizen of a different state, diversity jurisdiction could be asserted in such a direct action. The Louisiana act particularly resulted in a flood of essentially local lawsuits clogging already crowded district court dockets. By cloaking the nonresident insurer with the citizenship of its insured, Congress removed the basis of diversity jurisdiction. *See* S.Rep. No.1308, reprinted in (1964) U.S.Code Cong.&Admin.News 2778-80; Henderson v. Selective Ins. Co., 369 F.2d 143, 149 (6th Cir. 1966); White v. United States Fidelity & Guaranty Co., 356 F.2d 746, 747-48 (1st Cir. 1966).

Most courts which dealt with the 1964 amendment in the years immediately following its enactment tended to limit its application narrowly. *E.g.*, Henderson, *supra*; White, *supra*; Inman v. MFA Mutual Ins. Co., 264 F.Supp. 727 (E.D.Ark. 1967); Walker v. Firemans Fund Ins. Co., 260 F.Supp. 95 (D. Mont.1966); Carvin v. Standard Accident Ins. Co., 253 F.Supp. 232 (E.D.Tenn. 1966); *aff'd on merits without discussion of jurisdiction*, 395 F.2d 326 (6th Cir. 1968); Twin City Fire Ins. Co. v. Wilkerson, 247 F.Supp. 766 (E.D. Tenn.1965). The opinions in most of these cases stressed the specific purpose of the 1964 amendment and then concluded either that the

insurance involved was not "liability insurance" or that the action was not a "direct action" within the meaning of s 1332(c).

The Sixth Circuit Court of Appeals, on the other hand, concluded that "if [the statute's] language encompasses other situations, we should not limit application of the [diversity-limiting provision] to th e specific conditions which gave it birth." Id. at 425. The Sixth Circuit, examining the statute's language, held that "Congress, when it used the terms 'direct action' and 'liability insurance' in . . . §1332(c), did not intend the [language] to apply only to traditional tort claims." Ford Motor Co. v. Insurance Co. of N. Am., 669 F.2d 421, 424 (6th Cir. 1982)(*Quoting* Aetna Cas. & Surety Ins. Co. v. Greene, 606 F.2d 123, 126 (6th Cir. 1979)).

The Sixth Circuit reasoned that if state law "permit[s] one claiming injury at the hands of another who was covered by liability insurance to sue the liability insurer rather than the alleged wrongdoer," §1332(c)(1) adds the requirement of diversity of jurisdiction between the tortfeasor and the injured plaintiff – even though the tortfeasor is not a party. Ford Motor Co., 669 F.2d at 424. "By cloaking the nonresident insurer with the citizenship of its insured, Congress removed the basis of diversity jurisdiction." Id. In Kormanik, Judge Polster concluded that §1332(c)(1) applies to Scott-Pontzer cases, so that, when an employee sues his employer's insurance company for UM/UIM coverage, the defendant insurance company must be deemed a resident of the same state as the employer-insured.[4]

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[4] Both Chief Judge Paul R. Matia and Judge Kathleen M. O'Malley adopted the reasoning of Kormanik and remanded Scott-Pontzer cases for lack of diversity jurisdiction. *See* Kohus v. Hartford Ins. Co., slip op., case no. 01-CV-1179 (Nov. 19, 2001)(Dkt. #21); Comella v. St. Paul Mercury Ins. Co., slip op.,

Plaintiff appears to concede that the above-captioned matter is a "direct action", as that term has been defined by the case law which has developed following the enactment of § 1132. Plaintiff instead cites a number of cases which stand for the proposition that §1332(c) does not apply to actions by insureds against their own insurers, under the uninsured motorist provisions of their liability insurance policies. *See*, Fortson v. St. Paul Fire and Marine Ins. Co., 751 F.2d 1157, 1159, (11th Cir.1985); McGlinchey v. Hartford Accident and Indemnity Co., 866 F.2d 651 (3rd Cir. 1989); Rosa v. Allstate Ins. Co., 981 F.2d 669, 674 (2nd Cir.1992); White v. United States Fidelity & Guar. Co., 356 F.2d 746, 747 (1st Cir.1996).

However, it is the opinion of this court that the insurance relationship created by Scott-Pontzer is distinguishable from the typical UM/UIM relationship, that is, where a plaintiff sues his own insurer pursuant to a contract. Here, there is no contract of insurance between Monohan and the insurer defendants. Rather, Plaintiff brings suit based upon state statute, as interpreted by the Ohio Supreme Court in Scott-Pontzer, which "permits a person claiming injury or damage arising from the ownership or use of a motor vehicle to sue [his employer's] insurer rather than the owner or operator of the vehicle." *See* Ford, 669 F.2d at 425.

This statutory interpretation, like the no-fault statute examined in Ford, "represents a latter-day attempt by the state[] to improve the mechanism for recovery by those injured and damaged in accidents arising out of the use of motor vehicles." Id. at 425-26. In particular, the Ohio Supreme Court's statutory interpretation creates insurance coverage by operation of law, even though this "result . . . was not intended by the parties to

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case no. 00-CV-2664 (December 11, 2001)(Dkt. #100).

the insurance contracts at issue." Scott-Pontzer, 710 N.E.2d at 1120-21. In both the instant case and in Ford, state law allows a plaintiff to sue directly an otherwise unobligated insurer to recover the tortfeasor's liability. And, as in Ford, "[u]nless the proviso is held to apply, the same 'back door diversity' which Congress eliminated by the 1964 amendment [to §1332] would be possible" in Scott-Pontzer cases. Ford, 669 F.2d at 425.

Plaintiff further contends that because the insured in this case is not the tortfeasor, but, rather, Monohan's employer, the insurance policies at issue are not "liability policies." However, this Court is persuaded by the language of the Sixth Circuit in Ford, wherein the Court stated that, "Congress did not intend the [language of § 1332(c)] to apply only to traditional tort claims." Ford, 669 F.2d at 424. Moreover, as in Ford, it is an artifact of state law in the case *sub judice* that permits Plaintiff to name an insurance company as a defendant, without naming the tortfeasor as a party, and to recover damages caused by the absent tortfeasor.

In both this case and Ford Motor Co., state law makes insurance benefits available to an injured party "[other] than on the basis of traditional tort liability, and actions to secure the[se] benefits may be maintained directly against the insurer of the vehicle rather than the insured." Id. at 425. The factual circumstances of this case may be different from those of Ford Motor Co., but the logic leading to the application of § 1332(c)(1) is the same.

As Judge Polster noted in Kormanik, the Ohio Supreme Court's ruling in Scott-Pontzer has "resulted in a burgeoning number of cases that would not otherwise have fallen within the diversity jurisdiction of the federal courts." Slip op. at 4. Thus, "the same policy reasons that prompted the addition of the diversity restricting provision to § 1332(c) in the first place

apply with equal force to Scott-Pontzer actions." Id. Congress enacted §1332(c)(1) to ensure that this Court's limited diversity jurisdiction would not be expanded by state law, and, consequently, it is this jurisdiction-guarding "policy" that this Court enforces in the case *sub judice*.

In conclusion, it is the opinion of this Court that complete diversity of citizenship did not exist between the parties when this case was filed. Consequently, this matter is **DISMISSED** for lack of subject matter jurisdiction.

IT IS SO ORDERED.

s/ Peter C. Economus 12/20/01
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01CV1179

RONALD KOHUS

Plaintiff

v.

HARTFORD INSURANCE COMPANY

Defendant

JUDGE: PAUL R. MATIA

ORDER OF REMAND

Pursuant to this Court's Memorandum of Opinion and Order filed contemporaneously with this Order of Remand,

It is ordered that the plaintiffs' motion to remand is granted. This action is hereby remanded to the Court of Common Pleas of Cuyahoga County, Ohio.

IT IS SO ORDERED.

/s/ Paul R. Matia
JUDGE PAUL R. MATIA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

A copy of the foregoing Order of Remand was filed electronically this 19th day of November, 2001. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Paul R. Matia
JUDGE PAUL R. MATIA

CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01CV1179

RONALD KOHUS

Plaintiff

v.

HARTFORD INSURANCE COMPANY

Defendant

JUDGE: PAUL R. MATIA

MEMORANDUM OF OPINION
AND ORDER

On March 7, 1987, the plaintiff, Ronald Kohus, was severely injured while a passenger in a motor vehicle operated by an uninsured motorist. An uninsured motorist claim was pursued against his insurance carrier, Allstate Insurance Company, which paid him the policy limits but did not adequately compensate him for his injuries. At that time, plaintiff was employed by Plainville Ready Mix Concrete, Inc. who was insured under a commercial general liability insurance policy with defendant Hartford Insurance Company (Hartford). The plaintiff alleges in his complaint that this insurance policy included underinsured motorist coverage, or if not, said coverage arises by operation of law. Plaintiff seeks to recover under his former employer's insurance policy pursuant to the Ohio Supreme Court's decision in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660 (1999). The action, originally

filed in the Common Pleas Court of Cuyahoga County, Ohio was removed by defendant in accordance with 28 U.S.C. § 1441(a) on the basis of diversity of citizenship, 28 U.S.C. § 1332(c). This matter is before the Court upon the plaintiff's motion to remand on the ground that complete diversity of citizenship does not exist as the plaintiff and defendant are both citizens of Ohio. (ECF 16). Along with the brief attached to this motion, the Court has reviewed the defendant's memorandum in opposition to the plaintiff's motion to remand to state court. (ECF 20). For the following reason, the plaintiff's motion to remand is granted.

A corporation is a citizen of any state where it has been incorporated and the state where it has its principal place of business. 28 U.S.C. § 1332(c). In the present case defendant Hartford is incorporated and has its principal place of business in Connecticut. In 1964, 28 U.S.C. § 1332(c) was amended as follows:

> [I]n any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insurer is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business;

If this case is considered a direct action against Hartford it will be a citizen of both Connecticut and Ohio because Hartford's insured, Plainville Ready Mix Concrete, Inc, is an Ohio corporation with its principal place of business in Ohio. Thus, diversity will be lacking.

This provision was added because the States of Louisiana and Wisconsin enacted statues allowing suits directly against insurance companies without joining the tortfeasors resulting in an increase in diversity cases. *Henderson v. Selective Ins. Co.*, 369 F.2d 143, 149 (6th Cir. 1966). The Sixth Circuit defines "direct action" as "an action that under applicable state law may be brought directly against the insurer by the tort claimant prior to entry of judgment against the alleged tortfeasor." *Stockton v. General Acc. Ins. Co.*, 897 F.2d 530, 1990 WL 20477 at * 3 (6th Cir.). *Stockton* involved a garnishment lawsuit brought by judgment creditors against an insurer that the Sixth Circuit found was not a direct action under § 1332(c) because a valid judgment against the insured tortfeasor was a prerequisite to any action by the plaintiffs against the insurer. *Id.* at * 3.

Recently, United States District Judge Dan Aaron Polster granted a motion to remand in *Kormanik v. St Paul Insurance and Marine Co.*, Case No. 4:01CV2122 (N.D. Ohio 2001) (unreported), on the ground that the court lacked subject matter jurisdiction based on § 1332(c). Judge Polster relied on the reasoning in *Henderson v. Selective Ins. Co.* wherein the Sixth Circuit recognized that § 1332(c) was adopted in order to address the increasing burden faced by federal courts as a result of new state laws which created diversity actions. *Id.*, 369 F.2d at 149. The Sixth Circuit extended its reasoning in *Henderson* to actions directly against an insurer pursuant to Michigan's no-fault insurance law in *Ford Motor Co. v. Insurance Company of North America*, 669 F.2d 421 (6th Cir. 1982). The court opined that the provision of § 1332(c) should not be limited to the specific conditions that arose with the new Louisiana and Wisconsin laws. *Id.* at 425. Because of Congress's reaction to the earlier state legislation, no-fault insurance should not be held to expand the jurisdiction of federal courts. *Id.* at 426.

The *Scott-Pontzer* case has resulted in an escalation of cases filed in this Court that would otherwise not have been filed here, the same reaction that occurred in connection with the Louisiana and Wisconsin legislation. As Judge Polster recognized, *Scott-Pontzer* has caused unsettled questions of law to arise that require the district courts to attempt to guess how the Ohio Supreme Court would rule in certain situations.[5] It would be better for the state courts to address these issues. The same reasons that motivated the enactment of 28 U.S.C. § 1332(c) also apply to *Scott-Pontzer* type actions.

Further, this action satisfies the Sixth Circuit definition of direct action. It is a direct action against an insurer of a company that was not involved in plaintiff's accident. *Scott-Pontzer* type actions do not require a prior entry of judgment against a tortfeasor. *See Kormanik v. St. Paul Fire and marine Insurance Co.*, at P. 5. The Court concludes that this is a direct action depriving it of subject matter jurisdiction pursuant to 28 U.S.C. § 1332(c).

Accordingly, for the foregoing reason, the plaintiff's motion to remand (ECF 16) is granted.

IT IS SO ORDERED.

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[5] For example, Ohio law is not settled as to whether limitations or conditions precedent in an insurance policy apply when insurance coverage is imposed by law. See *Myers v. Safeco Ins. Co.*, 2000 WL 329800 (Ohio App., 5th Dist.), *rev'd*, 91 Ohio St.3d 333 (2001) (reversal based on *Davidson v. Motorists Mut. Ins. Co.*, 91 Ohio St.3d 262, 264 (2001)); *Luckenbill ex rel Luckenbill v. Midwestern Indemnity Co.*, 2001 WL 585730 (Ohio App., 2nd Dist.)

/s/ Paul R. Matia
JUDGE PAUL R. MATIA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum of Opinion and Order was filed electronically this 19th day of November, 2001. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Paul R. Matia
JUDGE PAUL R. MATIA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:01CV2138

NAOMI GOODEN, et al.,

Plaintiffs,

v.

NATIONAL UNION FIRE INS. CO., et al.,

Defendants.

JUDGE: DAN AARON POLSTER

ORDER

On October 24, 2001, this Court ordered Defendants to show cause within ten days why this case should not be remanded for lack of subject matter jurisdiction. (ECF No. 16). On November 13, 2001, Defendants filed a memorandum in response to the Order. (ECF No. 19). Having reviewed Defendants' memorandum, the Court finds that diversity of citizenship exists because the Defendants' insured, the Motor Wheel Corporation, is a citizen of Michigan. Accordingly, the Court finds that it has subject matter jurisdiction over the case.

IT IS SO ORDERED.

S/Dan Aaron Polster 11/14/01
Dan Aaron Polster
United States District Judge

APPENDIX K

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01cv0851

GREGORY H. ROGERS,

Plaintiff,
v.

BRUCE JEFFREY KOHLER, II, et al.,

Defendants.

JUDGE: O'MALLEY

MEMORANDUM & ORDER

In this action, plaintiff Gregory Rogers sues defendants Bruce Kohler II and Chubb Group of Insurance Companies (Chubb"). Rogers alleges he was injured while riding as a passenger on a motorcycle driven by Kohler. Rogers further alleges that Chubb issued a commercial business automobile insurance policy to his employer, Shoney's, Inc. Rogers states a number of claims, on one of which is that he is an insured under the Chubb policy's underinsured motorists ("UIM") coverage, pursuant to Scott-Pontzer v. Liberty Mut. Fire Ins. Co 85 Ohio St.3d 660 (Ohio 1999). The parties have filed cross-motions for summary judgment.

In the summary judgment motions, however, the parties

did not address the propriety of removal jurisdiction. Rogers originally filed this action in the Cuyahoga County, Ohio Court of Common Pleas. Defendants then removed the action to this Court, based on diversity of jurisdiction: Rogers is a resident of Ohio, Kohler is a resident of North Carolina, and Chubb is a resident of New Jersey and Indiana. Thus, the defendants asserted that removal was proper based on diversity jurisdiction.

As this Court has recently noted, however, 28 U.S.C. §1332(c)(1) applies to cases permitted by Scott-Pontzer. Kormanik v. St. Paul Fire and Marine Ins. Co., Case No. 5:01CV 02122, slip op. (Polster, J.). In pertinent part, this statute states that, "in any direct action against the insurer of a policy or contract of liability insurance . . . to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of businsess." Thus, Chubb must also be deemed a resident of those states where its named insured, Shoney's, resides. The record does not reveal where Shoney's resides, but legal research suggests Shoney's is a resident of Tennessee. Booty v. Shoney's Inc., 872 F. Supp. 1524, 1528-29 (E.D. La. 1995).

In addition, the Ohio Supreme Court ruled in Scott-Pontzer that a corporation's employees, even thought they were not a "named insured," were still "insureds" entitled to UIM coverage under a commercial automobile liability policy designating the corporation as the named insured. In other words, for purposes of his Scott-Pontzer UIM claim against Chubb, Rogers is an "insured" of Chubb; thus, pursuant to 28 U.S.C. §1332(c)(1), it appears that Chubb may be deemed a resident of Ohio, Rogers' state of residency. This circumstance, of course, would defeat diversity jurisdiction.

Accordingly, the Court **ORDERS** defendants to **SHOW CAUSE** why this action should not be remanded to state court, for lack of jurisdiction. Defendants shall file a show-cause brief on the date 14 calendar days after the date of this Order, and plaintiff may file a response brief 21 calendar days after the date of this Order. If defendants fail to file a show-cause brief, the Court will remand this action.

IT IS SO ORDERED.

s/Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01CV1063

Douglas Johnson, et al.,

Plaintiffs,

v.

Fireman's Fund Insurance Co., et al.

Defendants.

JUDGE: DONALD C. NUGENT
Dated January 15, 2002

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Motion of Plaintiffs Douglas and LeeAnn Johnson to Remand the action to the Court of Common Pleas for Cuyahoga County. (ECF#12). Plaintiffs contend that this Court lacks subject matter jurisdiction because diversity of citizenship does not exist between the parties. For the reasons that follow, Plaintiffs' Motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, who are Ohio residents, filed this action in the Court of Common Pleas of Cuyahoga County. Defendant Fireman's Fund Insurance Company ("Fireman's Fund") is a

California company with its principal place of business in California. Defendant removed the action to this Court based upon diversity jurisdiction.

In their Complaint, Plaintiffs allege that Mrs. Johnson was involved in an automobile accident, caused by Rhonda Janey, in which she sustained serious and permanent injuries. The Complaint alleges that Ms. Janey's insurance company, State Farm Insurance Company, has offered is policy limits of $50,000. Since Mrs. Johnson's injuries are alleged to far exceed $50,000, Ms. Janey was underinsured.

At the time of the accident, Mr. Johnson was employed by Modern Tool & Die Corporation. ("MTD"). MTD is an Ohio company with its principal place of business in Ohio. At all pertinent times, MTD was insured under a commercial general liability policy issued by Defendant Fireman's Fund. Plaintiffs seek a declaration that Plaintiffs are entitled to uninsured/underinsured (UM/UIM) motorist coverage under MTD's Fireman's Fund general liability policy in accordance with the holding of the Ohio Supreme Court in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 710 N.E.2d 116 (Ohio 1999) and its progeny. *Scott-Pontzer* and its progeny hold that unless an insured business and its insurer agree otherwise, and their agreement meets specific requirements, UM/UIM motorist coverage automatically exists in favor of the insured business by operation of law, and the business insured's employees also automatically receive this UM/UIM motorist coverage.

In their motion to remand, Plaintiffs assert that diversity does not exist pursuant to 28 U.S.C. § 1332(c)(1) which provides:

> In any direct action against the insurer of a policy or contract of liability insurance, whether

> incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as any State by which the insurer has been incorporated and of the State where it has its principle place of business.

Recent decisions by Judge Daniel A. Polster, Chief Judge Paul R. Matia and Judge Kathleen O'Malley have examined § 1332(c)(1) and have concluded that in *Scott-Pontzer* cases (where an employee or an employee's family member sues his employer's insurance company for UM/UIM coverage) the insurance company must be deemed a resident of the same state as the employer-insured. *Kormanik v. St. Paul Fire and Marine Ins. Co.*, slip op. at 2-6, case no. 5:01 CV 2122 (Oct. 19, 2001); *Kohus v. Hartford Ins. Co.*, slip op. at 2-5, case no. 1:01 CV 1179 (Nov. 19, 2001); *Comella v. St. Paul Mercury Ins. Co.*, slip op. at 4-9, case no. 1:00 CV 2664 (Dec. 11, 2001). However, Judge Ann Aldrich, Judge Patricia A. Gaughan and Judge Leslie Brooks Wells have determined that these *Scott-Pontzer* cases are not "direct actions" within the meaning of § 1332 (c)(1) and thus, the diversity limiting provision of § 1332 (c)(1) does not apply. *Redmon v. Sumitomo Marine Management (USA), Inc.*, slip op. at 2-8, case no. 1:01 CV 397 (Oct. 30, 2001); *Fidelity and Guaranty Ins. Underwriters, Inc. v. Nocero*, slip op. at 11-17 (Dec. 13, 2001); *Bliss v. Nat. Union Fire Ins. Co. of Pittsburgh, Pa.*, slip op. at 1-2 (Nov. 1, 2001).

If the diversity limiting provision of § 1332 (c)(1) applies in this instance, Fireman's Fund would be deemed a citizen of the same state as MTD and Plaintiffs, which is Ohio, and diversity jurisdiction would not exist. Conversely, if this action is not a direct action within the meaning of § 1332 (c)(1),

then the parties are diverse and this Court has jurisdiction.[6]

Plaintiff's Motion for Remand (ECF #12) is fully briefed and ready for decision.

DISCUSSION

The only issue before the Court is whether this lawsuit constitutes a "direct action" as that phrase is defined in § 1332 (c)(1). Section 1332 (c)(1) provides that "[i]n any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen ...". A majority of courts that have attempted to define "direct action" for the purposes of § 1332(c)(1) have determined that a direct action is

> one 'in which a party suffering injuries or damage for which another is legally responsible is entitled to bring suit against the other's liability insurance without joining the insured or first obtaining a judgment against him.' *Beckham v. Safeco Ins. Co. of America*, 691 F.2d 898, 901-02 (9th Cir. 1982). In other words, this direct action exception that destroys diversity exists only where a third-party tort victim forgoes suing the tortfeasor in favor of instead of

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[6] While Plaintiffs have filed their Motion to Remand several months after the action was removed to this Court, the motion is timely in that remand on the basis of lack of subject matter jurisdiction is required if the jurisdictional failure appears "any time before final judgment." 28 U.S.C. § 1447(c).

> suing the tortfeasor in favor of instead suing the tortfeasor's liability insurer directly. This is the universal rule. *See, e.g., Myers v. State Farm Ins. Co.*, 842 F.2d 705, 707 (3d Cir. 1988); *Fortston v. St. Paul Fire & Marine Ins. Co.*, 751 F.2d 1157, 1159 (11th Cir. 1985), *reh. denied*, 757 F.2d 287; *White v. United States Fidelity and Guarantee Co.*, 356 F.2d 746, 747-48 (1st Cir. 1966).

Vargas v. California State Auto. Ass'n Inter-Ins. Bureau, 788 F. Supp. 462, 463 (D. Nev. 1992).

Plaintiffs assert that this is a direct action because the insured is not joined as a party defendant. Despite this assertion, Plaintiffs are claiming to be insureds under Mr. Johnson's employer's general liability policy. The defendant insurance company disputes that Plaintiffs have any coverage under MTD's policy. Neither MTD nor Fireman's Fund has any connection to or bears any liability for the tortfeasor Ms. Janey. Rather, the only issue between Plaintiffs and Fireman's Fund is a coverage dispute between a potential insured and their insurance company. Review of the language of § 1332(c), as well as its legislative history and judicial decisions interpreting the section, lead the Court to the firm conclusion that the "insured" referred to in § 1332(c) is the tortfeasor not the tort claimant/plaintiff.

Congress adopted § 1332(c) in 1964 in response to a "direct action" statute which had been enacted in Louisiana which permitted tort claimants to bring a direct action against the tortfeasor's liability insurer without first obtaining judgment against the tortfeasor. As the legislative history of § 1332(c) makes clear, the purpose of § 1332(c) was to overcome the Louisiana direct action statute which allowed plaintiffs to file

suit against the tortfeasor's out of state liability insurer without joining the in-stated diversity destroying tortfeasor in federal court thus avoiding the Louisiana rule of State Courts under which appellate courts were not bound by the factual findings of a jury but could review the judgments of the lower courts on questions of fact and law. The Louisiana direct action statute caused large numbers of cases, that otherwise would have been filed in state courts, to be filed in the federal courts of that state. Senate Report No. 1308, reprinted in, 1964 U.S. Code Cong. & Admin. News 2778, 2785.

Thus, § 1332(c) applies where a tortfeasor's insurer is sued directly by the tort claimant in an action in which the tortfeasor-insured is not joined as a defendant. In those situations Congress determined that the tortfeasor's insurer should stand in the shoes of the tortfeasor and be deemed to have the same citizenship as the tortfeasor-insured. This was succinctly explained by the court in *Spooner v. Paul Revere Life Ins. Co.*, 578 F. Supp. 369, 373 (E.D. Mich. 1984) as follows:

> The application of [§ 1332(c)] to an insurance company in the typical tort action is proper because the tortfeasor has purchased the policy as protection against liability arising from his breach of duty owed to the injured party. The typical action is such that the act for which liability is sought to be imposed against the insurance company is the same act for which liability could be imposed against the insured. In this sense, the insurance company derives its liability from the insured. With the 1964 amendment [to § 1332], Congress intended that the insurer derive its citizenship from the insured as well.

Congress' purpose is not served in cases like this where the plaintiff is the tort claimant and is also claiming to be the insured. In this situation the insured is suing his own insurer.[7] The insurer has no connection to the tortfeasor and is not standing in the tortfeasor's shoes. Accordingly, § 1332(c) is inapplicable. *See Rosa v. Allstate Ins. Co.*, 981 F.2d 669, 678 n. 18 (2d Cir. 1992) ("Because the § 1332(c) proviso is designed to address cases in which an insured may be, but is not, joined as a party-defendant, it would be inappropriate for the proviso to affect situations where a person characterizable [sic] as an insured party sues the insurer, since a plaintiff obviously cannot join herself as a party-defendant."); *Bowers v. Continental Ins. Co.*, 753 F.2d 1574, 1576 (11th Cir. 1985)("The general rule has always been that the direct action proviso does not affect suits brought by an insured against his own insurer."); *White v. United States Fid. & Guar. Co.*, 356 F.2d 746, 747-48 (1st Cir. 1966)(suit by insured against insurer is not direct action within the meaning of § 1332(c).); *Kimball Small Props. v. Am. Nat'l Fire Ins.*, 755 F. Supp. 1465 (N.D. Cal. 1991)(same); *Field v. Liberty Mut. Ins. Co.*, 769 F. Supp. 1135, 1138 (D. Haw. 1991)(same); *McGlinchey v. Hartford Accident and Indem. Co.*, 666 F. Supp. 70, 71 (E.D. Pa. 1987 (same); *Smith v. State farm*

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[7] Some of the decisions which have found that *Scott-Pontzer* suits constitute direction actions within the meaning of § 1332(c) have distinguished the cases herein which have held that actions by insureds against their insurers are not direct actions on the ground that the plaintiff, while claiming to be entitled to UM/UIM benefits under his employer's policy, is not a party to the insurance contract and thus is not the insured. *See Comella*, slip op. at 7 n.3. This Court respectfully disagrees. One of the material allegations in the *Scott-Pontzer* claims is that the injured plaintiff is an insured (albeit by operation of law) under his or her employer's policy. The fact that the plaintiff is not a party to the insurance policy does not prohibit him from being an insured.

Ins. Co., 615 F. Supp. 453, 455 (D. Haw 1985 (same); *Bishop v. Allstate Ins. Co.*, 313 F. Supp. 875, 876 (W.D. Ark. 1970); *Adams v. State Farm Mut. Automobile Ins. Co.*, 313 F. Supp. 1349, 1352 (N.D. Miss. 1970); *USAA Cas. Ins. Co. v. Suzanne*, 1988 US Dist LEXIS 17883 at *2-3 (E.D. Mich. Aug. 2, 1988)("In the typical situation contemplated under § 1332(c), the injured party would bring a direct action against the tortfeasor's insurer for recovery of benefits. Thus, the insurance company would have the rights of its insured, the tortfeasor. However, the situation here is different since the injured person is suing his own insurer for uninsured motorist benefits and not for "no fault" benefits. The insurance company is acting on its own behalf against its insured. Thus diversity is proper....").

The Sixth Circuit has not interpreted § 1332(c) in such a manner as to require a finding that these *Scott-Pontzer* cases are direct actions. In *Ford Motor Co. v. Ins. Co. of North America*, 669 F.2d 421, 422 (6th Cir. 1982), the court held that § 1332(c) destroyed diversity where an injured party sues the tortfeasor's insurer under Michigan's no-fault statute and the plaintiff and the insured, though not a party, are citizens of the same state. The court determined that

> no-fault insurance operates in exactly the same way as the Louisiana and Wisconsin direct action statutes-it permits a person claiming injury or damage arising from the ownership or use of a motor vehicle to sue the insurer rather than the owner or operator of the vehicle. Unless the proviso is held to apply, the same "back door diversity" which Congress eliminated by the 1964 amendment would be possible under no-fault. No-fault represents a latter-day attempt by the states to improve the mechanism for recovery by those injured and

> damaged in accidents arising out of the use of motor vehicles. Given Congress' reaction to earlier state legislation which permitted direct actions, no-fault should not be held to expand the jurisdiction of federal courts. Where, by making the insurer the defendant a plaintiff creates an apparent diversity which would not exist if the owner or operator of an insured vehicle were a named defendant, § 1332(c) operates to deny jurisdiction by attributing the citizenship of the insured to the insurer.

Id. at 425-426. While other circuits have determined that the direct action proviso of § 1332(c) does not apply to no-fault insurance claims, *See Rosa*, 981 F.2d at 678-79; *Bowers*, 753 F.2d at 1576, the Sixth Circuit's holdings in *Ford Motor Co.* does not require a finding that the direct action proviso also applies to UM/UIM coverage in *Scott-Pontzer* type cases. In *Ford Motor Co.*, the injured claimant brought suit directly against the tortfeasor's insurer-not his own insurer. Accordingly, the rationale behind the Court's decision in *Ford Motor Co.* is inapplicable to this case.[8]

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[8] While the Court agrees with the findings of Judge O'Malley, Judge Polster and Judge Matia that Ohio law, by virtue of *Scott-Pontzer* and its progeny, has resulted in an escalation of cases filed in this Court that would otherwise not have been filed here and that these cases require the Court to attempt to guess how the Ohio Supreme court will rule in certain situations, those facts do not make these cases "direct actions". The Louisiana statute and the Michigan no-fault statute both permitted injured persons to file direct actions against the tortfeasor's insurer without joining the tortfeasor or obtaining a judgment against him. In both cases the insurer stands in the shoes of the tortfeasor and is thus deemed to be a citizen of the same state as the tortfeasor. In *Scott-Pontzer*

Similarly, in the unreported case of *Stockton v. General Accident Ins. Co.*, 897 F. 2d 530, 1990 WL 20477 (Mar. 6, 1990), the Sixth Circuit determined that the direct action proviso of § 1332(c) did not apply to an injured plaintiff's creditor's action against his tortfeasor's insurer. The court stated that "[t]he general understanding in this circuit has been that the term "direct action," as used in the [§ 1332(c)] proviso, means an action that under applicable state law may be brought directly against the insurer by the tort claimant prior to entry of any judgment against the alleged tortfeasor." *Id.* at *3-4. Because a valid judgment against the tortfeasor was a prerequisite to any action by the plaintiffs against the tortfeasor's insurer General Accident, § 1332 (c) was inapplicable. *Id.* at *4. Plaintiffs' argument that they meet this definition of direct action because *Scott-Pontzer* actions do not require prior entry of a judgment against the tortfeasor, *see Kormanick*, slip op. at 5 n. 1, ignores that fact that the insured in *Stockton* was the tortfeasor.

Direct actions within the context of § 1332(c) exist only when an injured party is permitted to sue the tortfeasor's insurer directly, without joining the tortfeasor or obtaining a judgment against the tortfeasor. *Scott-Pontzer* actions, including the one at bar, do not meet this definition. Accordingly, the diversity limiting proviso of § 1332(c)(1) is not applicable.

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cases the insurer is not the tortfeasor's liability insurer and in fact has no connection whatsoever to the tortfeasor.

CONCLUSION

For the reasons stated herein, Plaintiffs' *Scott-Pontzer* claim is not a direct action within the meaning of § 1332 (c)(1). Accordingly, Plaintiffs' Motion for Remand (ECF#12) is DENIED.

IT IS SO ORDERED.

s/ Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: January 15, 2002

APPENDIX M

[Filed Dec.13, 2001, PM 4:20]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01 CV 397

Fidelity and Guaranty Insurance
Underwriters, Inc.,

Plaintiff,

v.

Patricia Nocero, Administrator of the
Estate of Bernadette Hutchins,

Defendant.

JUDGE PATRICIA A. GAUGHAN

MEMORANDUM OF OPINION AND ORDER

This matter is before the Court upon Defendant's Motion to Remove Case to State Court, or in the Alternative, to Certify Any State Law Questions to the Ohio Supreme Court (Doc. 22). This cases arises out of the death of defendant's decedent in a motor vehicle accident. Plaintiff seeks a declaratory judgment regarding the rights and responsibilities of the parties with respect to uninsured/underinsured motorists (hereinafter "UM/UIM") coverage provided by plaintiff to the decedent's former employer. For the following reasons, the Motion is DENIED.

FACTS

For the purpose of ruling on defendant's Motion, the facts as set forth in the Complaint are assumed to be true.

On June 11, 2000 Bernadette Hutchins was killed while riding as a passenger on a motorcycle owned by Jessica D. Steinbach and operated by Michael D. McElroy when it was struck by a vehicle operated by Damian Square. (Compl. ¶ 2). Defendant Patricia Nocero is the Administrator of the Estate of Bernadette Hutchins. (Compl. ¶ 3).

According to defendant, Hutchins was an employee of Medallion Lighting Corporation & Western Reserve Lamp Works & Rentalight (hereinafter "Medallion") at the time of the accident. (Compl. ¶ 3). Defendant has made a claim for UM/UIM coverage under Medallion's Business Auto Policy No. BFA00000613373, which was issued by plaintiff Fidelity and Guaranty Insurance Underwriters, Inc. effective May 19, 2000 through May 19, 2001. (Compl. ¶¶ 1, 3). Defendant's claim for UM/UIM coverage is based on *Scott-Pontzer v. Liberty Mutual Fire Insurance Co.*, 710 N.E.2d 1110 (Ohio 1999).[9]

Plaintiff seeks a declaration that its Policy does not provide UM/UIM coverage with respect to the accident involved in this case based on its claim that the terms of its Policy are "markedly different" than those interpreted in *Scott-Pontzer* (Compl. ¶ 4).

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[9] In *Scott-Pontzer*, the Ohio Supreme Court held that a corporation's employees were insureds entitled to UM/UIM coverage regardless of whether they were acting within the scope of their employment at the time of the accident in question.

Plaintiff bases jurisdiction on diversity of citizenship. (Compl. ¶ 8). Plaintiff is a Wisconsin corporation engaged in the insurance business with its principal place of business located in Wisconsin. (Compl. ¶ 6). Defendant is an individual who resides in Ohio.[10] (Compl. ¶ 7).

Defendant seeks to remove this case to the Lake County Court of Common Pleas or, in the alternative, to certify state law questions to the Ohio Supreme Court. Plaintiff opposes defendant's Motion.

STANDARD OF REVIEW

Defendant argues that removal from this Court to the Lake County Court of Common Pleas is proper pursuant to 28 U.S.C. §§ 1332(c)(1) and 1441. However, neither of these statutes provide a basis for the removal of a case originally filed in a federal court to a state court.[11] Therefore, defendant's Motion will be treated as one to dismiss for lack of subject matter jurisdiction.

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[10] The legal representative of the estate of a decedent is deemed a citizen of the same state as the decedent. 28 U.S.C. § 1332(c)(1). Although not averred to, defendant claims that Hutchins was a resident of Painesville Township, Ohio. Plaintiff does not dispute this fact. Thus, defendant is deemed to be a citizen of Ohio for the purpose of determining this Court's subject matter jurisdiction.

[11] 28 U.S.C. § 1441 sets forth the circumstances under which a civil action originally filed in a state court over which a federal court would have original jurisdiction may be removed by the defendant to the appropriate federal district court. 28 U.S.C. § 1332(c)(1), which is discussed in detail below, sets forth the requirements for federal diversity jurisdiction.

When a court's subject matter jurisdiction is challenged, the party seeking to invoke jurisdiction bears the burden of proof. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Rogers v. Stratton*, 798 F.2d 913, 915 (6th Cir. 1986). This burden is not onerous. *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996). The party need only show that the complaint alleges a substantial claim under federal law. *Id.*

A motion to dismiss for lack of subject matter jurisdiction may constitute either a facial attack or a factual attack. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). Facial attacks question the sufficiency of the jurisdictional allegations in the complaint. *Id.* Thus, those allegations must be taken as true and construed in the light most favorable to the nonmoving party. *Id.* Factual attacks, however, challenge the actual fact of the court's jurisdiction. *Id.* In such cases, the truthfulness of the complaint is not presumed. *McGee v. East Ohio Gas Co.*, 111 F.2d 979, 982 (S.D. Ohio 2000) (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320 (6th Cir. 1990)). Instead, the Court may weigh any evidence properly before it. *Morrison v. Circuit City Stores, Inc.*, 70 F.Supp.2d 815, 819 (S.D. Ohio 1999) (citing *Ohio Nat'l*, 922 F.2d 320; *Rogers*, 798 F.2d 913).

When presented with a facial attack, the non-moving party "can survive the motion by showing any arguable basis in law for the claim made." *Musson Theatrical*, 89 F.3d at 1248. Thus, such a motion will be granted only if, taking as true all facts alleged in the complaint, the Court is without subject matter jurisdiction to hear the claim. *Matteson v. Ohio State University*, 2000 WL 1456988 * 3 (S.D. Ohio Sept. 27, 2000).

DISCUSSION

Subject Matter Jurisdiction

Generally, in an action based on diversity of citizenship, a corporation is deemed to be a citizen of any state in which it is incorporated as well as of the state in which its principal place of business is located. 28 U.S.C. § 1332(c)(1). In certain cases, however, an exception to that rule exists:

> [I]n any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

Defendant's arguments are based on this exception, commonly referred to as the "direct action proviso."

Defendant claims and plaintiff does not dispute that Medallion is an Ohio corporation with its principal place of business in Mentor, Ohio. Medallion has not been made a party to this action. Thus, if this case involves a "direct action against the insurer of a policy or contract of liability insurance," plaintiff must be deemed a citizen of Ohio and this case dismissed for lack of subject matter jurisdiction.

Plaintiff argues that the direct action proviso is inapplicable to this case for three reasons: (1) this case does not involve a policy or contract of liability insurance; (2) this case does not involve an action against an insurer; and (3) this case

does not involve a "direct action" in the sense intended by the statute. In addition, plaintiff argues that the policy considerations raised by defendant are not relevant to a determination of whether subject matter jurisdiction based on diversity of citizenship exists.

Defendant claims that the plain language of § 1332(c)(1) establishes the lack of subject matter jurisdiction in this case. Defendant argues that the Sixth Circuit has interpreted the direct action proviso broadly enough to encompass this case. In addition, defendant argues that the purpose of the proviso is to relieve the federal courts of a flood of diversity cases in which an out-of-state insurer is sued directly and the insured is not joined as a defendant. According to defendant, the Ohio Supreme Court's decision in *Scott-Pontzer* threatens to create just such a flood. Defendant argues that insurers should not be permitted to circumvent the purpose of the direct action proviso merely by rushing to the federal courthouse before a claimant can file a complaint for damages in state court. Finally, defendant argues that public policy supports a finding of no subject matter jurisdiction. Defendant asserts that Ohio law regarding UM/UIM coverage is in a state of flux and redefinition which the Ohio state courts are in a better position to resolve. In addition, defendant argues that the Ohio state courts can more efficiently handle the large volume of *Scott-Pontzer* cases that have been and will be filed. Defendant requests that this Court abstain from exercising jurisdiction on the grounds that it would serve no useful purpose; rather, it would encroach on the ability of Ohio state courts to resolve issues in this uncertain area of law.

28 U.S.C. § 1332(c)(1)

As explained by the Supreme Court,

> Congress added the [direct action] proviso to § 1332(c) in 1964 in response to a sharp increase in the caseload of Federal District Courts in Louisiana resulting largely from that State's adoption of a direct action statute. The Louisiana statute permitted an injured party to sue the tortfeasor's insurer directly without joining the tortfeasor as a defendant. Its effect was to create diversity jurisdiction in cases in which both the tortfeasor and the injured party were residents of Louisiana, but the tortfeasor's insurer was considered a resident of another State. Believing that such suits did "not come within the spirit or the intent of the basic purpose of the diversity jurisdiction of the Federal judicial system," Congress enacted the proviso "to eliminate under the diversity jurisdiction of the U.S. district courts, suits on certain tort claims in which both parties are local residents, but which, under a State 'direct action' statute, may be brought directly against a foreign insurance carrier without joining the local tort-feasor as a defendant."

Northbrook Nat. Ins. Co. v. Brewer, 493 U.S. 6, 9-10 (1989) (citations omitted).

Defendant characterizes this case as "a direct action, based on a contract of insurance, brought by Plaintiff, Fidelity and Guaranty Insurance Underwriters, Inc." This characterization undermines defendant's own argument that the plain language of § 1332(c)(1) prohibits a finding of subject

matter jurisdiction in that, as noted above, the direct action proviso only applies to a "direct action **against** the insurer of a policy or contract of **liability** insurance." Defendant is correct that this Court must give effect to "the natural and plain meaning [of] statutes as passed by Congress." *National Life & Accident Ins. Co. v. United States*, 524 F.2d 559, 560 (6th Cir. 1975). However, the natural and plain meaning of the direct action proviso does not destroy diversity in this case.

First, a UM/UIM policy is not a "policy or contract of **liability** insurance." *Hernandez v. Travelers Ins. Co.*, 489 F.2d 721, 725 (5th Cir. 1974).

In *Aetna Casualty & Surety Insurance Co. v. Greene*, 606 F.2d 123, 127 (6th Cir. 1979), the Sixth Circuit adopted the definition of liability insurance set forth by the court in *Vines v. United States Fidelity & Guaranty Co.*, 267 F.Supp. 436, 437-438 (E.D. Tenn. 1967):

> The term 'liability insurance' is applied to contracts which provide for indemnity against liability. Liability insurance is that form of insurance by which the insured is indemnified against loss or liability on account of bodily injuries sustained by others, or in a broader sense, against loss or liability on account of injuries to property. A policy of liability insurance is a policy that indemnifies against the condition of becoming liable.

(citations omitted). A policy or contract of liability insurance is "an indemnity agreement which protects the insured against his liability to others." *Twin City Fire Insurance Company v. Wilkerson*, 247 F.Supp.766, 767 (E.D. Tenn. 1965) (quoted with

approval in *Aetna*).

On the other hand, a cause of action involving UM/UIM coverage sounds in contract, rather than tort, law. *Miller v. State Farm Mut. Auto. Ins. Co.*, 87 F.3d 822, 825 (6th Cir. 1996) (quoting *Miller v. Progressive Casualty Ins. Co.*, 635 N.E.2d 317 (Ohio 1994)). *See also Rosa v. Allstate Ins. Co.*, 981 F.2d 669, 673 n.7 (2d Cir. 1992)(distinguishing between liability and first-party insurance). Under Ohio law, UM/UIM coverage does not indemnify an insured against loss or liability on account of personal or property injury to others. Rather, the purpose of UM/UIM coverage is to provide protection to an insured who is legally entitled to recover from the owner or operator of an uninsured or underinsured motor vehicle because of injury to the insured herself. O.R.C. § 3937.18.

In this case, defendant has asserted a claim for UM/UIM coverage for injuries sustained in a motor vehicle accident. Defendant does not seek to indemnify herself against liability for injuries suffered by another; she seeks to recover for fatal injuries sustained by Hutchins, who she asserts was a covered insured under plaintiff's policy with Medallion. Thus, defendant asserts claims against plaintiff as an insurer of a UM/UIM policy, not as an insurer of a liability policy.

Second, this case does not involve an action against an insurer. Rather, this case involves an action by an insurer against a claimed insured. The Supreme Court addressed the significance of this distinction in a case involving workers' compensation coverage in *Northbrook*. In that case, the insurer filed suit in a federal district court appealing a workers' compensation award to an employee of its insured by the Texas Industrial Accident Board. 493 U.S. at 7-8. The district court dismissed the case for lack of subject matter jurisdiction based upon the direct action proviso and the fact that the employee and

the insured employer were citizens of the same state. *Id.* at 8-9. The Supreme Court reversed on the grounds that the direct action proviso was inapplicable to a case brought by an insurer. *Id.* at 9. In the words of the Court,

> The language of the proviso could not be more clear. It applies only to actions *against* insurers; it does not mention actions *by* insurers.

Id. at 9. The Court reviewed the legislative history of the proviso and noted that Congress failed to "express any concern about diversity actions filed *by* insurance carriers." *Id.* at 10. Acknowledging the "somewhat anomalous" result of retaining diversity over actions initiated by out-of-state insurers while at the same time prohibiting their removal if initiated by an insured, the Court nonetheless held that this "seemingly incongruity" was insufficient to justify an extension of "the scope of Congress' precise wording in § 1332(c)." *Id.* at 12. Despite the fact that the proviso's purposes might be better served by a different result, the Court refused

> to attribute to Congress an intent broader than that specifically expressed in the direct action proviso. Congress could easily have used language to bar suits *by* insurers, and it can easily do so still.

Id. at 12-13.

The Sixth Circuit reached the same conclusion in *Aetna*,[12] finding that neither the proviso's legislative history nor

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[12] In *Aetna*, the insurer brought a declaratory judgment action against an employee of its insured for the purpose of settling

its plain language supported the conclusion that it was intended to apply to an action in which an insurer is the moving party. 606 F.2d at 127. The court explained the difference between such a case and one in which the injured party initiates the action:

> If, pursuant to § 1332(c), a liability insurer is denied access to the federal courts, the insurer is thereby forced to commence its action in a foreign jurisdiction, namely the local jurisdiction of the injured party. In this forum, the out-of-state insurer may, at the least in theory, be subject to a local prejudice in favor of the injured resident. Because of this possibility of prejudice, direct actions brought by liability insurers, unlike direct actions brought by injured parties, lie squarely within "the spirit and the intent...of the diversity jurisdiction of the Federal judicial system."

Id. (citation omitted). *See also Dairyland Ins. Co. v. Makover*, 654 F.2d 1120, 1125 (5th Cir. 1981) ("Section 1332(c) is not applicable to this declaratory judgment action in which a liability insurer is the plaintiff."); *Metropolitan Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991) (finding fact that insurer instituted action "makes all the difference"); *Evans v. Nationwide Ins. Co.*, 708 F.2d 723 (6th Cir. 1982), *unreported* ("A declaratory judgment action solely to determine coverage is not a direct action against an insurer within the meaning of 29 U.S.C. § 1332.").

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compensation claims arising from alleged work-related injuries. 606 F.2d at 125.

This Court cannot apply the direct action proviso to a case brought by an insurer when explicit statutory language directs that it applies to actions against insurers. *See Aetna*, 606 F.2d at 127. "No court is allowed to supplement a clear statutory provision such as § 1332(c), even when such supplement would produce beneficial results." *Id.* To do so would exceed this Court's power of statutory interpretation and encroach upon the congressional power to legislate. *Id.*

Because this case involves neither a "policy or contract of liability insurance" nor a "direct action against the insurer," this Court finds that the direct action proviso contained in § 1332(c)(1) is inapplicable.

Even if this case involved an action against an insurer of a policy or contract of liability insurance, § 1332(c)(1) would nonetheless be inapplicable. Despite the fact that two adequate bases for this conclusion have been set forth above, this Court feels compelled to address the issue of whether a *Scott-Pontzer* case constitutes a direct action under § 1332(c)(1) and finds that it does not.

The Sixth Circuit has not interpreted the term "direct action" so broadly as to include *Scott-Pontzer* cases. In fact, the entire theory underlying that line of cases, i.e., that the employee is an insured under her employer's UM/UIM policy, is contrary to the concept of a direct action. In a direct action, a claimant is permitted to directly sue the tortfeasor's insurer without joining the tortfeasor himself. In a *Scott-Pontzer* case, a claimant is permitted to directly sue her employer's insurer in order to gain the status of an insured and its attendant UM/UIM coverage.

"The general rule has always been that the direct action proviso does not affect suits brought by an insured against his

own insurer." *Bowers v. Continental Ins. Co.*, 753 F.2d 1574, 1576 (11th Cir.1985). This rule was first articulated by the First Circuit in *White v. U.S. Fidelity & Guaranty Co.*, 356 F.2d 746 (1st Cir. 1966). In *White*, an insured brought a declaratory judgment action against his automobile liability insurance company and his judgment creditor seeking a determination that a policy of insurance was in effect at time of an accident involving the plaintiff and the judgment creditor. *Id.* at 747. After the insurer removed the case to federal court, the plaintiff sought to have it remanded pursuant to § 1332(c)(1). *Id.* The plaintiff argued that the direct action proviso applied since her petition for declaratory judgment was a "direct action" and she, the insured, was not "joined as a party defendant." *Id.* The Court rejected this argument, holding that to do otherwise would ignore the clear legislative purpose as well as "the deliberate use of the adjective 'direct.'" *Id.* at 748. The Court then stated,

> We conclude on this issue by pointing out a logical impasse confronting plaintiff. She seeks to invoke Section 1332(c) to destroy diversity jurisdiction on the ground that this is an action against the insurer where the insured is not joined as a party defendant. But the whole substantive issue raised by her petition for declaratory judgment is whether at the date of the accident she was an insured and Fidelity was her insurer. In short, resolution of the ultimate substantive issue is a prerequisite to the resolution of the preliminary jurisdiction issue. This inverse illogic is another reason why Congress could not have intended the statute to have a broader reach than the purpose it so unequivocally described.

Id. See also McGlinchey v. Hartford Accident & Indemnity Co.,

866 F.2d 651, 653 (3d Cir. 1989) (holding action by insured against insurer on UM/UIM provision not a direct action under § 1332(c)(1)); *Bowers*, 753 F.2d at 1576 (holding action by insured against insurer on no-fault policy not a direct action under § 1332(c)(1)); *Bishop v. Allstate Ins. Co.*, 313 F. Supp. 875, 876 (W.D. Ark. 1970) (holding action by insured against insurer on UM/UIM provision not a direct action under § 1332(c)(1)); *Adams v. State Farm Mut. Automobile Ins. Co.* 313 F. Supp. 1349, 1352 (N.D. Miss. 1970) (same); *Inman v. MFA Mutual Ins. Co.*, 264 F. Supp. 727 (E.D. Ark. 1967) (same); *Carvin v. Standard Accident Ins. Co.*, 253 F. Supp. 232, 234 (E.D. Tenn. 1966) (holding action by insured against insurer on liability policy for the benefit of insured's creditors not a direct action under § 1332(c)(1)).

The Second Circuit agreed in *Rosa*:

> Because the § 1332(c) proviso is designed to address cases in which an insured may be, but is not, joined as a party-defendant, it would be inappropriate for the proviso to affect situations where a person characterizable as an insured party sues the insurer, since a plaintiff obviously cannot join herself as a party-defendant.

981 F.2d at 678 n.18.

The same reasoning applies to the case currently before this Court. Defendant asserts that Hutchins should be found to be an insured under the policy issued by plaintiff to Medallion. Under these circumstances, it is illogical to characterize this action as a direct action. The direct action proviso was passed in response to state direct action statutes authorizing actions against insurers by injured parties to whom the insured was

liable. In such a case, Congress determined that the insurer should stand in the shoes of, i.e., be deemed to have the same citizenship as, the insured. This purpose is not served when the claimed insured brings an action against her own insurer. In such a case, the insured and insurer are at odds; the insurer does not stand in the shoes of the insured. As explained by the court in *Spooner v. Paul Revere Life Ins. Co.*, 578 F.Supp. 369, 373 (E.D. Mich. 1984):

> The application of the proviso to an insurance company in the typical tort action is proper because the tortfeasor has purchased the policy as protection against liability arising from his breach of a duty owed to the injured party. The typical action is such that the act for which liability is sought to be imposed against the insurance company is the same act for which liability could be imposed against the insured. In this sense, the insurance company derives its liability from the insured. With the 1964 amendment, Congress intended that the insurer derive its citizenship from the insured as well.

In contrast, as set forth above, *Scott-Pontzer* cases sound in contract. There is no act for which liability can be imposed on both the insured and the insurer. Instead, the employee seeks to be deemed an insured in order to collect UM/UIM benefits from the insurer for injuries for which another uninsured or underinsured individual is liable. As explained by the Eleventh Circuit in *Fortson v. St. Paul Fire and Marine Insurance Co.*, 751 F.2d 1157, 1159 (11th Cir. 1985), "unless the cause of action against the insurance company is of such a nature that the liability sought to be imposed could be imposed against the insured, the action is not a direct action." *See also Rosa*, 981 F.2d at 675; *McGlinchey*, 866 F.2d at 653; *Tuck v. United*

Service Automobile Assoc., 859 F.2d 842, 847 (10th Cir. 1988); *Beckham v. Safeco Ins. Co. of America*, 691 F.2d 898, 902 (9th Cir. 1982).

Outside the context of the direct action proviso, a direct action is one "in which the insurance company is being sued for its own acts or omissions." *Broyles v. Bayless*, 878 F.2d 1400, 1405 n.1 (11th Cir. 1989). However, as used in § 1332(c)(1), "[t]he phrase 'direct action' is a term of art, and neither the statute nor the cases interpreting it support the view that it includes every action in which an insurance company is a party." *Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185, 1188 (5th Cir. 1988). Merely because "an insurer is a 'direct' party does not make the litigation a 'direct action'" under the proviso. *Id.* For example, in *Sours v. American States Ins. Co.*, 986 F.2d 1429, *2 (10th Cir. Feb. 22, 1993), *unreported*, the court held that an action by an injured motorist against the negligent motorist's insurer for negligent defense and bad faith was not a direct action under § 1332(c)(1). Other courts have reached the same conclusion with regard to an action by an insured against his insurer for failure to indemnify and defend, *Searles v. Cincinnati Ins. Co.*, 998 F.2d 728 (9th Cir. 1993); an action by an insured's parents against his insurer for breach of contract, breach of implied covenant of fair dealing and intentional infliction of emotional distress, *Tuck*, 859 F.2d at 847; an action by a widower against a doctor's insurer for failure to resolve his claim in good faith, *Fortson*, 751 F.2d at 1159; an action by an injured motorist against a negligent motorist's insurer for unfair settlement practices, *Beckham*, 691 F.2d at 902; and an action against a life insurer for breach of contract, *Velez v. Crown Life Ins. Co.*, 599 F.2d 471, 473 (1st Cir. 1979).

Contrary to defendant's assertions, the relatively narrow reading of the direct action proviso set forth above is not in conflict with Sixth Circuit precedent. While the Sixth Circuit

has not directly addressed the issue of whether cases involving UM/UIM coverage constitute direct actions, there is nothing to indicate that the court would interpret the direct action so broadly.

In *Henderson v. Selective Insurance Co.*, 369 F.2d 143, 144 (6th Cir. 1966), Charles Hunt was involved in an automobile accident while test-driving a car owned by the Louisville Motor Company. The four injured parties sued Hunt and the dealership in state court. *Id.* Hunt was defended by his insurer Allstate, and the dealership was defended by its insurer Selective. *Id.* A ruling was issued in favor of the dealership and against Hunt. *Id.* Subsequently, the four injured parties, now judgment creditors, brought an action against Selective and Fireman's Fund, the car salesman's insurer, in federal court. *Id.* at 144-145. On appeal, Selective moved to have the case remanded to state court based upon § 1332(c)(1) and lack of diversity between the judgment creditors and the dealership and salesman. *Id.* at 149. The Sixth Circuit denied the motion, stating that the direct action proviso "was not designed to reach the situation with which we are confronted here." *Id.* (citing *White*, 356 F.2d 746).

In *Ford Motor Co. v. Insurance Co. of North America*, 669 F.2d 421, 422 (6th Cir. 1982), the Sixth Circuit held that the direct action proviso destroyed diversity where a injured party sues the tortfeasor's insurer under Michigan's "no-fault" statute and the plaintiff and the insured, though not a party, are citizens of the same state. The court concluded that

> no-fault insurance operates in exactly the same way as the Louisiana and Wisconsin direct action statutes– it permits a person claiming injury or damage arising from the ownership or use of a motor vehicle to sue the insurer rather

> than the owner or operator of the vehicle. Unless the proviso is held to apply, the same "back door diversity" which Congress eliminated by the 1964 amendment would be possible under no-fault. No-fault represents a latter-day attempt by the states to improve the mechanism for recovery by those injured and damaged in accidents arising out of the use of motor vehicles. Given Congress' reaction to earlier state legislation which permitted direct actions, no-fault should not be held to expand the jurisdiction of federal courts. Where, by making the insurer the defendant a plaintiff creates an apparent diversity which would not exist if the owner or operator of an insured vehicle were a named defendant, § 1332(c) operates to deny jurisdiction by attributing the citizenship of the insured to the insurer.

Id. at 425-426.[13]

As discussed above, a UM/UIM policy does not operate

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[13] Other circuits have determined that the direct action proviso does not apply to no-fault insurance claims. *See Rosa*, 981 F.2d at 678-679; *McGlinchey*, 866 F.2d at 652-653; *Bowers*, 753 F.2d at 1576. In addition, *Ford Motor Co.* was criticized by the court in *Spooner v. Paul Revere Life Insurance Co.*, 578 F.Supp. 369, 372 (E.D. Mich. 1984), for misreading the cases upon which it relied. The court in *Spooner* stated that it was "not bound to follow" *Ford Motor Co.* and concluded that the direct action proviso was not applicable to an action involving no-fault insurance. *Id.* at 372-374. In any case, however, *Ford Motor Co.* does not require this Court to find that the direct action proviso applies to UM/UIM coverage.

in exactly the same way as a liability policy. In addition, in a *Scott-Pontzer* case, the claimed insured asserts claims against her own insurer. In *Ford Motor Co.*, the injured party asserted claims against the tortfeasor's insurer. Thus, the purpose of the direct action proviso and the rationale behind the court's decision in *Ford Motor Co.* are not applicable to this case. As the Sixth Circuit stated in *Stockton v. General Accident Insurance Co.*, 897 F.2d 530 *3 (6th Cir. March 6, 1990), *unreported*,

> The general understanding in this circuit has been that the term "direct action," as used in the proviso, means an action that under applicable state law may be brought directly against the insurer by the tort claimant prior to entry of any judgment against the alleged tortfeasor.

(citing *Carvin*, 253 F.Supp. 232 (holding action by insured against insurer on liability policy for the benefit of insured's creditors not a direct action under § 1332(c)(1)); *Cunningham v. State Farm Mut. Auto Ins. Co.*, 297 F.Supp. 1138 (E.D. Tenn 1969) (holding action by injured motorist against tortfeasor's insurer for breach of implied contract to pay extent of insured's liability not a direct action under § 1332(c)(1))).

A direct action under § 1332(c)(1) does not include an action brought by an insurer against a claimed insured for declaratory judgment as to the parties' rights and responsibilities under the UM/UIM provisions contained in a policy issued to the claimed insured's employer. Therefore, this Court finds that the direct action proviso contained in § 1332(c)(1) is

inapplicable.[14]

Abstention

A finding that this Court has the power to exercise subject matter jurisdiction does not end the inquiry in light of defendant's request that this Court abstain from doing so.

There are three types of abstention recognized by the Supreme Court. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813-817 (1976). When a case involves questions of state law, the resolution of which may moot or present in a different posture a federal constitutional question, this Court should abstain pending resolution of the state law questions by a state court. *See, e.g., Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). Similarly, this Court should abstain from exercising federal review over a state law question if doing so would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. *See, e.g., Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Finally, this Court should abstain where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, state nuisance proceedings antecedent to a criminal prosecution or the collection of state taxes. *See, e.g., Younger v. Harris*, 401 U.S. 37 (1971); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Great Lakes Dredge & Dock Co. v.*

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[14] This Court is aware of, but respectfully disagrees with, the opinions issued in *Kohus v. Hartford Insurance Co.*, No. 01CV1179 (N.D. Ohio Nov. 19, 2001); *Verhovec v. Wausau Insurance Co.*, No. 01CV662 (N.D. Ohio Nov. 14, 2001); and *Kormanik v. St. Paul Fire and Marine Insurance Co.*, No. 01CV 2122 (N.D. Ohio Oct. 19, 2001).

Huffman, 319 U.S. 293 (1943).

All three abstention doctrines dictate against abstention in this case. This case does not involve federal constitutional issues. Nor are there any concurrently-pending state criminal, nuisance or tax collection proceedings. While this case does involve state law claims, the state law to be applied appears to be settled in that there is an Ohio Supreme Court case which defendant argues is directly on point. *See Scott-Pontzer*, 710 N.E.2d 1116.

As explained by the Supreme Court,

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.

Colorado River, 424 U.S. at 813 (citations omitted).

Defendant has failed to show that exceptional circumstances exist such that abstention would clearly serve an interest more compelling than this Court's duty to exercise its jurisdiction. Therefore, this Court declines to abstain in this matter.

Certification of Questions to Ohio Supreme Court

Plaintiff correctly points out that defendant has failed to articulate any questions that require certification. Instead, defendant merely "requests this Court certify any question of State law regarding insurance coverage and the interpretation of O.R.C. 3937.18 to the Ohio Supreme Court per Ohio S.Ct. Practice R. 18." Defendant claims that certification is warranted in the interest of judicial economy and preservation of judicial resources.

Rule 18 § 1 of the Rules of Practice of the Supreme Court of Ohio states,

> The Supreme Court may answer a question of law certified to it by a court of the United States. This rule may be invoked when the certifying court, in a proceeding before it, determines there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court, and issues a certification order.

Defendant has failed to articulate a specific question of Ohio law that may be determinative of the issues in this case for which there is no controlling precedent in the decisions of the Ohio Supreme Court. To the contrary, defendant's arguments in this case are based on *Scott-Pontzer*, a recently-decided and arguably controlling opinion issued by that court.

Therefore, this Court finds that certification to the Ohio Supreme court is not required.

CONCLUSION

For these reasons, Defendant's Motion to Remove Case to State Court, or in the Alternative, to Certify Any State Law Questions to the Ohio Supreme Court is denied.

IT IS SO ORDERED.

s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

APPENDIX N

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:00 CV 1864

Margaret F. Martin, et al.,

Plaintiff(s),

v.

Liberty Mutual Insurance Co., et al.,

Defendant(s)/Third-Party Plaintiffs.

JUDGE: DOWD

ORDER

On November 16, 2001, the Court issued an order in which the Court questioned its subject matter jurisdiction in light of the Opinion and Order issued by the Honorable Dan A. Polster in *Kormanik v. St. Paul Fire and Marine Ins. Co.*, Case No. 5:01CV 2122. Accordingly, the Court vacated the trial date of November 26, 2001 and permitted the parties to brief the issue of jurisdiction.

The Court has received Plaintiffs' brief regarding jurisdiction, and Defendant's brief is forthcoming, as the Court gave the parties until December 3, 2001 in which to file their briefs. In the interim, however, the Court has continued to study this issue, and the Court is now of the opinion that it does have

jurisdiction. Accordingly, the Court conducted a status conference with counsel for the parties on November 26, 2001 to discuss rescheduling this matter for trial.

Trial with respect to Plaintiffs' case-in-chief is scheduled for Friday, November 30, 2001 beginning at 9:00 a.m. Upon conclusion of Plaintiffs' case-in-chief, the Court will stand in recess until Wednesday, December 12, 2001 at 1:00 p.m., at which time Defendants will present their case-in-chief.

Despite the fact that the Court has rescheduled this matter for trial, Defendants shall still have until December 3, 2001 in which to address the issue of jurisdiction. In the event Defendants are successful in convincing the Court that it does not have jurisdiction, the Court will not go forward on December 12, 2001.

IT IS SO ORDERED.

November 27, 2001
Date

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

APPENDIX O

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:01 CV 2046

GLENN E. BLISS, JR. *Personally, and as the Administrator of the Estate of* BRENDA K. BLISS

Plaintiff

-vs-

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

Defendant

JUDGE: LESLEY WELLS

ORDER

On 11 September 2001, this Court ordered Defendant National Union Fire Insurance Company of Pittsburgh ("National Union") to show cause on or before 11 October 2001 why this case should not be remanded to the Court of Common Pleas for Cuyahoga County, Ohio for lack of subject matter jurisdiction. (Docket No. 7). On 11 October 2001, National Union filed a memorandum of law in response to the order, in which National Union argues that complete diversity of citizenship exists. (Docket No. 9).

The Court is satisfied that cause has been shown why this case should not be remanded. Accordingly, the case will proceed.

IT IS SO ORDERED.

/s/ Lesley Wells
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 26 2002
OFFICE OF THE CLERK

No. 01-1883

In The
Supreme Court of the United States

FEDERAL INSURANCE COMPANY,

Petitioner,

v.

KENNETH R. JONES, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT E. SOLES, JR.
Counsel of Record
JOHN L. JUERGENSEN
BLACK, MCCUSKEY,
SOUERS & ARBAUGH
1000 Unizan Plaza
220 Market Ave., S.
Canton, Ohio 44702
Tel: (330) 456-8341
Fax: (330) 456-5756
E-mail: bsoles@bmsa.com
Counsel for Respondents
Kenneth R. Jones, et al.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a Circuit Court may review an Order of Remand beyond its plain language to determine whether that Order was based on a lack of subject matter jurisdiction despite the fact 28 U.S.C. §1447(d) unequivocally prohibits the review of remand orders which are based on a lack of subject matter jurisdiction.

PARTIES TO THE PROCEEDINGS

Petitioner, Federal Insurance Company
15 Mountain View Road
Warren, NJ 07059

Respondents, Kenneth R. Jones and Mary B. Jones
13571 Sousa St.
N. Lawrence, Ohio 44666

American Motorists Insurance Company
1 Kemper Dr.
Long Grover, IL 60049

Energy Insurance (Bermuda), Ltd.
P.O. Box HM 2064
Hamilton HM HX, Bermuda

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JURISDICTION

By the application of 28 U.S.C. §1447(d), neither the Sixth Circuit Court of Appeals nor the Supreme Court of the United States has jurisdiction to review an order of remand which is based upon a lack of subject matter jurisdiction.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1332(c)(1):

> For the purposes of this section and section 1441 of this title – a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business

28 U.S.C. §1447(c) and (d):

> (c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment

of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF FACTS

On March 27, 1999, Kenneth R. Jones ("Mr. Jones") was injured in a motorcycle collision when Leslie Billups failed to yield the right of way at a stop sign. (Pet. App. F at p. 38a.) As a result of the collision, Mr. Jones' left leg was crushed, and he suffered two cracked ribs. (Pet. App. F at p. 38a.) Mr. Jones was forced to have his left foot, ankle, and calf amputated, resulting in substantial medical bills and expenses, tremendous pain and suffering, and lost wages and lost earning capacity. (Pet. App. F at p. 38a.)

STATEMENT OF THE CASE

Kenneth and Mary Jones (individually referred to as "Mr. Jones" and "Mrs. Jones," and collectively referred to as the "Joneses") filed a Complaint on May 30, 2001, in the Stark County, Ohio, Court of Common Pleas against Petitioner, Federal Insurance Company ("Federal"),

American Motorists Insurance Company ("American"), and Energy Insurance (Bermuda), Ltd. ("Bermuda") alleging that the Joneses were entitled to coverage under insurance policies issued by Federal, American, and Bermuda. (Pet. App. at p. 36a.) Most importantly for the issues involved in Federal's Writ, ***the tortfeasor, Leslie Billups is not a party to this action***.

Because it is important to the Court's understanding of the issues involved, the Joneses will summarize the underlying substantive law in this case. The Joneses' claims against Federal are based upon the Ohio Supreme Court's decision in *Scott-Pontzer v. Liberty Mutual Ins. Co.*, 85 Ohio St.3d 660 (Ohio 1999). At the time of Mr. Jones' collision, Ohio required that ***every*** insurer offer ***every*** insured the opportunity to accept or reject uninsured and/or underinsured motorist coverage ("UM/UIM coverage"). Ohio Revised Code §3937.18(A) (1999). If an insurer failed to offer an insured UM/UIM coverage, such coverage arose by operation of law within the terms of the policy. See generally *Gyori v. Johnston Coca-Cola Bottling Group*, 76 Ohio St.3d 565 (Ohio 1996).

In *Scott-Pontzer*, *supra*, the Ohio Supreme Court analyzed the definition of "Who Is An Insured" in two Liberty Mutual policies issued to the Superior Dairy Corporation. The policy defined an insured as "You." *Id.* at 663. The Court reasoned that the defined term "You" was ambiguous. *Id.* at 664. "You" could refer to the corporation, or it could include the corporation's employees because a corporation cannot occupy an automobile, suffer bodily injury or death, or operate a motor vehicle. *Id.* at 664. Where the term of an insurance contract is ambiguous, the term is construed against the drafter. *Id.* at 665.

Accordingly, corporate employees were deemed insureds under the policy, and, because the insurer did not offer UM/UIM coverage, such coverage arose by operation of law. *Id.* at 665. Because coverage arose by operation of law, the fact that the corporate employee was neither working for the corporation nor operating a corporate vehicle at the time of his injuries was irrelevant because of the insured's violation of Ohio law and public policy. *Id.* at 665-66.

At the time of the collision, Mr. Jones was employed by American Electric Power ("AEP"), an Ohio corporation. (Pet. App. F at p. 38a.) Federal is a UM/UIM carrier for AEP. (Pet. App. F at p. 38a.) The Joneses filed their claims ***directly*** against Federal (as well as American and Bermuda) because Federal denied the Joneses' claims for UM/UIM coverage under its AEP policy. (Pet. App. F at p. 38a.)

On July 7, 2001, Federal removed this case to the United States District Court for the Northern District of Ohio. (Pet. App. F.) Removal was alleged to be based upon diversity of citizenship between the parties. (Pet. App. F. at pp. 30a, 31a.) Federal argued that the defendants were citizens of New Jersey, Illinois, and the Bahamas and that the Joneses were citizens of Ohio. (Pet. App. F. at p. 30a.)

On October 22, 2001, Judge Daniel Polster of the United States District Court for the Northern District of Ohio, ordered Federal to show cause why this case should not be remanded to state court for lack of subject matter jurisdiction. (Pet. App. D.) After the parties briefed their respective positions to the court, Judge Polster issued an Order on November 14, 2001, remanding the case back to the Stark County, Ohio, Court of Common Pleas. (Pet. App. B.)

The basis for remand was that, pursuant to 28 U.S.C. §1332(c)(1), Federal was deemed to be a citizen of the same state as its insured. (Pet. App. B at pp. 6a, 7a.) Federal's insured is AEP which is an Ohio corporation. (Pet. App. B at pp. 6a, 7a.) As the Joneses are also citizens of Ohio, complete diversity did not exist between the parties and the court therefore lacked subject matter jurisdiction. (Pet. App. B at pp. 6a, 7a.)

Federal timely appealed to the Sixth Circuit Court of Appeals. (App. A.) On January 15, 2002, the Joneses filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction with the Sixth Circuit. (App. B.) The basis of the Motion to Dismiss was that 28 U.S.C. §1447(d) clearly prohibits the review of remand orders which are based on a lack of subject matter jurisdiction. (App. B.) The Sixth Circuit agreed, and, on March 26, 2002, the court granted the Joneses' Motion to Dismiss finding that Judge Polster remanded the case back to state court for no other reason than because the District Court lacked subject matter jurisdiction. (Pet. App. A.)

Not satisfied that the Sixth Circuit properly applied 28 U.S.C. §1447(d), Federal filed its Petition for Writ of Certiorari ("Petition for Writ").

REASONS FOR DENYING THE WRIT

Federal's arguments in support of its Petition for Writ all flow from one basic contention, i.e. that the Sixth Circuit did not ensure that the District Court's remand order was based on a lack of subject matter jurisdiction. Federal argues throughout its brief that the Sixth Circuit

simply "rubber stamped" the remand order because it contains the words "subject matter jurisdiction."

Federal argues that the Sixth Circuit refused to make "even a limited inquiry into the basis of the District Court's order of remand." (Petition for Writ at 7.) Federal then argues that such a stance "places the Sixth Circuit in conflict with decisions of the Tenth, Third, and Fourth Circuits." (Petition for Writ at 7.)

However, as is more fully set forth below, Federal attempts to manufacture a conflict where there is none by confusing the analysis of the circuit courts with the courts' results. In other words, Federal tries to convince this Court that there is a conflict among the Circuits as to how they ***analyze*** the application of 28 U.S.C. §1447(d) to remand orders. In reality, the Circuits all apply the same analysis with respect to the reviewability of remand orders. However, based upon the application of that analysis to each case's particular facts, the courts differ in their results.

Just because courts arrive at different decisions based upon different fact patterns does not mean that the analysis which is applied is in conflict. As this Court will be shown, the Sixth Circuit did nothing different than other courts which have considered the reviewability of remand orders.

I. Certiorari should not be granted because there is no conflict among the Circuit Courts as to the standard of review of a remand order which is based upon lack of subject matter jurisdiction.

The Circuits are not in conflict as to the scope of review applicable in determining whether a remand is within the 28 U.S.C. §1447(d) prohibition on review. Rather, Federal attempts to manufacture a conflict among the circuits by ignoring the Sixth Circuit's opinion and by reading into it unsubstantiated motives.

Based upon this Court's rulings in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995), the Sixth Circuit made a determination that the District Court's remand order was based on a lack of subject matter jurisdiction. Therefore, in following United States Supreme Court authority, the Sixth Circuit determined that the case was immune from review under Sections 1447(c) and 1447(d).

In an effort to seek this Court's review, Federal attempts to argue that the decision of the Sixth Circuit is in conflict with decisions from the Tenth and Fourth Circuits. In support of its perceived conflict, Federal first cites to the Tenth Circuit's opinion in *Flores v. Long*, 110 F.3d 730: "The mere mention of §1447(d) or the 'magic words' of subject matter jurisdiction [] do not automatically render a remand order nonreviewable under §1447(d)." *Id.* at 732.

It then cites to the Fourth Circuit opinion in *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442 (1996), which stated "powerful policy considerations and persuasive decisional authority support our power – and responsibility – to look past contextually ambiguous allusions and even specific citations to §1447(c) to determine by independent review of the record the actual grounds or basis upon which the district court considered it was empowered to remand."

Based upon isolated statements from each of these cases, Federal asserts that a conflict between the circuits exists, implies that the Sixth Circuit just tersely reviewed the District Court's remand order looking for the "magic words" of §1447(d) or "subject matter jurisdiction," and alleges that the Sixth Circuit refused to review the appeal. However, it is clear from the opinion that the Sixth Circuit reviewed the District Court's order, considered Federal's arguments, and dismissed them as without merit.

In its Order dismissing Federal's appeal, the Sixth Circuit stated:

> This Court has recognized that a remand order may be reviewed if it is "based on a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction." [Citations omitted.] But when the issue sought to be appealed is subsumed into the jurisdictional decision, it is not independently appealable.

(Pet. App. A at p. 4a.) The Sixth Circuit further found that "the legal holding with which [Federal] takes issue was in the context of the larger jurisdictional determination." (Pet. App. A at p. 4a.) Based upon such analysis, the court then determined that remand decisions based on jurisdiction were not reviewable.

In actuality and as demonstrated above, the Sixth Circuit made a ***substantial*** inquiry into the underlying rationale of the District Court's Order of Remand. First, it recognized that an order of remand may be reviewable in certain limited circumstances. It stated that, where an order of remand is based on a reason other than the lack of subject matter jurisdiction, as required by 28 U.S.C. §1447(d), then the order is reviewable on appeal. The court then determined that the District Court's remand order was based on a lack of subject matter jurisdiction, not on the merits of a collateral issue. It applied the clear and unambiguous requirements of Section 1447(d) and properly dismissed Federal's appeal.

The Court clearly considered Federal's arguments, and it noted that, when a District Court analyzes substantive issues within the larger jurisdictional context, such that those substantive issues were "subsumed" into the issue of subject matter jurisdiction, the remand order is not reviewable.

The Joneses have argued and continue to argue that orders of remand based upon a lack of subject matter jurisdiction are not reviewable pursuant to Section 1447(d). However, in a practical sense, the Joneses realize that to a very limited extent the order or remand ***must be*** reviewed to determine whether or not it was based on a lack of subject matter jurisdiction. Federal goes to great lengths to argue in favor of that which the Sixth Circuit did when it reviewed the remand order (i.e. a review of the remand order to determine if it was based on a lack of subject matter jurisdiction). Once this review is made (as the Sixth Circuit did) and the reviewing court is satisfied that the requirements of Section 1447(d) were met (as the

Sixth Circuit did), then the order of remand is subject to no further review.

Ironically, the Tenth Circuit held in *Flores* that "the remand order was based to a fair degree upon the court's finding that it lacked subject matter jurisdiction to hear the case. Therefore, the district court remand was pursuant to §1447(c) and under §1447(d) we have no jurisdiction to review the remand order." *Flores*, *supra*, at 733.

Moreover, in *Mangold*, the Fourth Circuit, upon review of a remand order, concluded that the case was remanded for a reason ***other than*** a lack of subject matter jurisdiction. *Mangold*, *supra*, at 1451. Because the district court remanded the case because it believed it had discretion to do so (and not because of lack of subject matter jurisdiction), the Fourth Circuit held that Section 1447(d) did not prohibit review of the remand order. *Id*.

If Federal is arguing that a conflict exists among the Circuit courts and that the standard of review is substantially different, the decisions which it cites should actually conflict with that of the Sixth Circuit. Neither of these two cases, in fact, conflict with the analysis or standard of review used by the Sixth Circuit.

Federal then argues that the Sixth Circuit should have considered Federal's constitutional arguments. However, Federal cites to no conflicting opinion where a Circuit Court held that such a consideration is required under the Section 1447(d) analysis.

Federal concludes this portion of its argument by attacking the underlying analysis of District Court's remand order. However, such analysis is not sanctioned by Section 1447(d) nor is it supported by the cases to which

Federal cites in support of the supposed conflict. *Flores* and *Mangold* stand for the proposition that a Circuit Court may review a remand order for the limited purpose of ensuring that the district court based its order of remand on a lack of subject matter jurisdiction. There is no conflict between Federal's cases and the Sixth Circuit's opinion because the Sixth Circuit acted in accord with those cases. Therefore, there is no conflict regarding the standard of review employed by the circuits. Consequently, this Court's supervisory power is not necessary to rectify any alleged "disparate standards" and Certiorari should be denied.

II. Certiorari should not be granted because the District Court's decision was a routine finding that diversity of citizenship was lacking between the parties, and, consequently, 28 U.S.C. §1447(d) applied to bar Federal's appeal.

In further support of its request for certiorari, Federal argues that the Sixth Circuit's decision is also in conflict with decisions out of the Third and Fourth Circuits. Federal argues that the review of a remand order is not prohibited by 28 U.S.C. §1447(d) where the "ruling which triggered the remand order, was not the type of jurisdictional determination routinely and regularly made pursuant to §1447(c)." *Carr v. American Red Cross*, 17 F.3d 671, 682. Again, the cases to which Federal cite are distinguishable and, thus, inapplicable to the Sixth Circuit's decision. As such, there is no actual or perceived conflict among the Circuits.

Carr involves a complicated procedural background. Plaintiff sued his medical provider, Osteopathic Medical

Center, and the American Red Cross after a negligent blood transfusion. The Red Cross then removed the case to federal court under its charter which granted federal courts jurisdiction over claims against the Red Cross. However, plaintiff seemingly settled its claims against the Red Cross. The Red Cross was dismissed, and plaintiff moved to remand now that diversity jurisdiction was lacking. Osteopathic sought to challenge the dismissal of the Red Cross.

The Third Circuit first determined that "a district court cannot prevent appellate review of a final collateral order by contemporaneously remanding a case to state court." *Carr* at 675. Here, the collateral order was the order dismissing the Red Cross from the suit. The prohibition on the reviewability of remand orders under Section 1447(d) would have denied Osteopathic the opportunity to challenge the district court's dismissal of the Red Cross. As such, the Third Circuit held that "where a district court's dispositive order – whether substantive or jurisdictional – is separable from the subsequent order of remand . . . the remand order itself must also be reviewable by the Court of Appeals." *Carr* at 680.

Likewise, in *Aliota v. Graham*, 984 F.2d 1350 (3rd Cir. 1993), the district court's order of remand was based on a preceding order which was final and appealable ***and*** separate and distinct from the order of remand. In this case, Plaintiffs sued various federal employees for defamation. The U.S Attorney General certified that the employees were acting within the course and scope of their employment and substituted the United States as defendant. Following an evidentiary hearing, the district court found that the employees were not acting within the course and scope of their employment and ordered the

resubstitution of the original defendants. The district court then remanded the case for a lack of subject matter jurisdiction.

The Third Circuit reversed the district court and held that the "review of the question of resubstitution in the present case is not barred by 28 U.S.C. §1447(d) (1988). [Whether the defendants were acting within the course and scope of their employment] is separate from and logically precedes the question of remand." *Aliota* at 1353.

Finally, Federal cites to *Borneman v. United States*, 213 F.3d 819 (4th Cir. 2000) in support of a supposed conflict among the circuits. *Borneman* is similar to the *Aliota* decision. In that case, the Fourth Circuit reversed the decision of the district court to remand because the order of remand, although based on a lack of subject matter jurisdiction, "was premised on two antecedent decisions that are both judicially reviewable and appealable: (1) that the United States' scope-of-employment certification was erroneous and (2) that the United States' substitution as defendant was erroneous." *Borneman* at 825.

In the instant case, there was no collateral and/or antecedent order by the District Court. The court simply found that, based upon the application of Section 1332(c) to the facts of this case, diversity of citizenship was lacking between the parties. This is specifically what the Sixth Circuit referred to when it stated that "the legal holding with which [Federal] takes issue was in the context of the larger jurisdictional determination." (Pet. App. A at 4a.) In essence, the District Court's holding that Section 1332(c) applied was made within the context of its determination that the court lacked subject matter jurisdiction.

Accordingly, the case at hand is readily distinguishable from *Carr*, *Aliota*, and *Borneman*, *supra*. Federal's perceived conflict among the circuits is without merit and certiorari should be denied.

III. Certiorari should not be granted because the issue presented herein is whether 28 U.S.C. §1447(d) bars appellate review of remand orders and not whether the "direct action proviso" applies to suits by putative insureds against insurers seeking a determination of coverage.

Federal's third reason in support of granting its Petition for Writ is nothing more than misdirection and irrelevant analysis of issues which have no bearing on this case. Federal attempts to direct this Court's attention away from the essential issue of the case, i.e. whether 28 U.S.C. §1447(d) prohibits a review of the District Court's remand order, with its diatribe on the application of Section 1332(c), the "direct action proviso," to Ohio's *Scott-Pontzer*, *supra*, doctrine.

Amid the legislative history of the direct action proviso, the application of the statute to different types of insurance policies, and its endless line of Northern District of Ohio cases, Federal cites to no case which conflicts with the Sixth Circuit's decision to dismiss Federal's appeal in accordance with Section 1447(d). The underlying legal analysis of the District Court is completely and utterly irrelevant as to whether or not Federal is entitled to Sixth Circuit review of the Order of Remand.

Federal's appeal to the Sixth Circuit is barred by Section 1447(d) and the prohibition against the review of

remand orders which are based on a lack of subject matter jurisdiction. Yet, in this portion of Federal's brief, it seeks to skip over Congress' clear bar to review and go right to the underlying substantive issues. Federal is putting the cart before the horse, or in this case, substantive matters before procedural ones. If Federal is successful in having the Sixth Circuit's Order of Dismissal reversed, then the parties will brief the underlying substantive issues to the Sixth Circuit. Until Federal convinces this Court that the Sixth Circuit improperly dismissed Federal's appeal, the underlying substantive issues are irrelevant to this Court's application to Section 1447(d) to the facts of this case.

Assuming *arguendo* that the underlying substantive issues are relevant to this Court's determination, there can be no conflict among the circuits as to the application of Section 1332(c) to the *Scott-Pontzer* line of cases because, to the best of the Joneses' knowledge, Ohio is the only state in the country which analyzes uninsured and underinsured motorist coverage in the manner that Ohio does. Accordingly, Federal cites to no case in a circuit other than the Sixth Circuit which has applied Section 1332(c) as the federal courts in Ohio have.

Furthermore, the fact that judges within the United States District Court for the Northern District of Ohio are in conflict with each other over the application of Section 1332(c) to the *Scott-Pontzer* cases does not justify granting a writ of certiorari. The conflict will eventually be addressed by the Sixth Circuit using the properly prescribed jurisdictional procedures. In a case where a district court denies a plaintiff's motion to dismiss for lack of subject matter jurisdiction and where the plaintiff ultimately fails on the merits of his case, the matter may be appealed to

the Sixth Circuit and the lack of subject matter jurisdiction issue may be raised on appeal.

At that point, the Sixth Circuit can definitively determine whether Section 1332(c) operates to destroy diversity in *Scott-Pontzer* cases. This is the only proper jurisdictional procedure for addressing this issue unless and until this Court grants certiorari and reverses the decision of the Sixth Circuit to dismiss Federal's appeal.

Regardless, Federal's arguments with respect to the direct action proviso were not before the Sixth Circuit on Federal's appeal and should not be addressed before this Court. As such, Federal offers no conflict among the Circuits which would warrant the granting of a writ of certiorari, and the writ should be denied.

IV. Certiorari should not be granted because Federal is unreasonably requesting this Court to strike down every jurisdictional limitation which Congress has placed on parties in an action in Federal Court.

In its final, "catch-all" reason for granting its Petition for Writ, Federal argues that somehow there is a conflict among the Circuits as to whether the power of the judiciary flows from the Constitution of the United States or from Congress. In support of its poorly constructed argument, Federal cites to snippets of cases and quotes taken out of their original context.

For example, Federal cites to *Terral v. Burke Construction*, 257 U.S. 529 (1922) which deals with the issue of whether or not a state can make a foreign corporation waive its right to pursue an action in federal court against that state's residents as a condition precedent to doing

business within its borders. Interestingly, Federal also references *Bondurant v. Watson*, 103 U.S. 281 (1880) which held, in part, that as long as a suit complied with the requirements of removal, the case could be properly heard in federal court. *Id.* at 287.

Finally, Federal cites *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922), which is actually dispositive of Federal's arguments:

> Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.

Id. at 232.

Federal confuses the constitutional right to pursue a claim in federal court with the Congressional grant of jurisdiction to pursue the same claim. Provided a party meets the jurisdictional requirements set forth by Congress to maintain an action in federal court, a person's constitutional right to proceed against a citizen of another state cannot be infringed.

Taken to its logical conclusion, Federal would have this Court find unconstitutional the requirements that a claim arise under the Constitution, laws, or treaties of the United States or the requirement that there be diversity of citizenship and a particular amount in controversy. Federal seems to argue that the requirement that the amount in controversy must exceed $75,000.00 or that

there be complete diversity unconstitutionally limits a person's right to federal court. The Constitutional right to federal court has already been reconciled with the jurisdictional restrictions placed upon that right by Congress. *Kline*, *supra*.

For good measure, Federal then argues that this Court should determine whether or not rights to due process and equal protection flow from the "Constitutional presumption of local prejudice" and whether the citizenship of "totally disinterested parties may be considered in determining diversity." Simply stated, these issues have no bearing on whether Section 1447(d) bars appellate review of a remand order which was based on a lack of subject matter jurisdiction. Again, Federal attempts to blur the distinction between legitimate constitutional questions and the clear and unambiguous jurisdictional requirements set forth by Congress. The issues which Federal raises here are irrelevant to this Court's consideration of the statutory requirements of Section 1447(d). Federal merely perceives a conflict where none exists. Consequently, the Petition for Writ should be denied.

CONCLUSION

The provisions of 28 U.S.C. §1447(d) naturally contemplate that, on appeal, a circuit court must first review the order of remand to ensure that the district court did, in fact, issue the order based upon lack of subject matter jurisdiction. This is precisely what the Sixth Circuit did. It addressed Federal's arguments in its decision, reviewed the analysis of the District Court, and found that

the District Court in good faith determined that there was a lack of subject matter jurisdiction. Consequently, based upon the clear language of Section 1447(d) and congressional intent, the court determined that it was prohibited from reviewing the remand order.

Now, Federal, in an attempt to seek this Court's review, attempts to manufacture conflicts among the circuits where none exist. As evidenced by the cases which Federal cites, circuit courts perform a review of remand orders to ensure that the provisions of Section 1447(d) are met. If the circuit court is satisfied that the order of remand was issued because of a lack of subject matter jurisdiction, then the remand order is not subject to further review. Federal has cited to no case in which a circuit court acted differently.

Furthermore, the District Court did not issue an order prior to the remand order that would otherwise have been appealable in the absence of Section 1447(d). Therefore, the cases which Federal cites in support of this proposition are inapplicable. Finally, Federal's exposition on the applicability of the "direct action proviso" as well as the constitutional implications of this case are irrelevant to this court's determination as to whether the Sixth Circuit properly dismissed Federal's appeal.

In the end, Federal only hopes to convince this Court that a conflict exists. However, the Sixth Circuit's dismissal of Federal's appeal in no way conflicts with how other Circuit Courts are analyzing the applicable statutes.

As such, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

ROBERT E. SOLES, JR.
Counsel of Record
JOHN L. JUERGENSEN
BLACK, MCCUSKEY,
SOUERS & ARBAUGH
1000 Unizan Plaza
220 Market Ave., S.
Canton, Ohio 44702
Tel: (330) 456-8341
Fax: (330) 456-5756
E-mail: bsoles@bmsa.com
Counsel for Respondent
Kenneth R. Jones, et al.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KENNETH R. JONES, et. al., Plaintiffs	CASE NO. 5:01CV1616
	JUDGE DAN AARON POLSTER
vs.	**NOTICE OF APPEAL**
FEDERAL INSURANCE CO., et. al., Defendants	(Filed Dec. 11, 2001)

Notice is hereby given that Federal Insurance Company, one of Defendants in the above-named case, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Opinion and Order of the United States District Court for the Northern District of Ohio, Eastern Division, remanding the cause to state court

entered in this action on the 14th day of November, 2001. A copy of the Opinion and Order are attached hereto.

Respectfully submitted,

OF COUNSEL:
GALLAGHER, SHARP,
FULTON & NORMAN

/s/ D'John Travis

D'JOHN TRAVIS
(0011247)
1501 Euclid Avenue
Seventh Floor –
Bulkley Building
Cleveland, Ohio
44115-2108
Phone: (216) 241-5310
Fax: (216) 241-1608
E-mail: Dit@gafn.com.
Attorney for
Defendant Federal
Insurance Co.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

KENNETH R. JONES, et. al. **Plaintiffs-Appellees,** **v.** **FEDERAL INSURANCE COMPANY** **Defendant-Appellant,** **and** **AMERICAN MOTORISTS INSURANCE COMPANY, et al.** **Defendants.**	**Case No.: 01-4323** **(On Appeal from U.S. District Court Case No. 5:01CV1616)** **APPELLEES' MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION**

Plaintiffs-Appellees, Kenneth R. Jones and Mary B. Jones ("the Joneses"), by and through counsel, hereby move this Court, pursuant to 28 U.S.C. 1447(d) for its Order dismissing Appellant, Federal Insurance Company's Appeal ("Federal"). Based on the non-reviewability of orders of remand, this Court lacks jurisdiction over this matter and Federal's appeal should be dismissed.

A. Procedural Background

The Joneses filed a Complaint on May 30, 2001, in the Stark County Court of Common Pleas against, *inter alia*, Federal alleging that the Joneses were entitled to coverage under an insurance policy issued by Federal. On July 7,

2001, Federal removed this case to the United States District Court for the Northern District of Ohio.

Removal was based upon diversity of citizenship between the parties. The defendants in the case below were citizens of New Jersey, Illinois, and the Bahamas. The Joneses are citizens of Ohio.

On October 22, 2001, Judge Polster ordered Federal to show cause why this case should not be remanded for lack of subject matter jurisdiction. After the parties briefed their respective positions to the court, Judge Polster issued an Order on November 14, 2001, remanding the case back to the Stark County Court of Common Pleas. A copy of the Order is attached hereto as **Exhibit "A."**

The basis for remand was that, pursuant to 28 U.S.C. 1332(c)(1), Federal is deemed to be a citizen of the same state as its insured. Federal's insured is American Electric Power, Inc., an Ohio corporation. As the Joneses are also citizens of Ohio, complete diversity did not exist between the parties and the court below lacked subject matter jurisdiction.

Federal now seeks review of Judge Polster's decision in the herein appeal.

B. <u>Legal Argument</u>

Under 28 U.S.C. 1447(d), an order remanding a case to the State court from which it was removed is "not reviewable on appeal or otherwise," unless the case involves a civil rights claim.

The United States Supreme Court has held that only remand orders pursuant to 28 U.S.C. 1447(c) are non-

reviewable. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). That section allows for an order of remand for defects in the removal procedure and when the District Court lacks subject matter jurisdiction. 28 U.S.C. 1447(c).

The Supreme Court has recently re-affirmed their decision in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995):

> As long as a district court's remand is based on a timely raised defect in removal procedure ***or on lack of subject-matter jurisdiction*** – the grounds for remand recognized by § 1447(c) – a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d).

Id. at 127. (Emphasis added.)

Therefore, where a court remands a case back to the state court from which it arose, the order is not reviewable by the appeals court. *Zuniga v. Blue Cross and Blue Shield of Michigan*, 52 F.3d 1395 (6th Cir. 1995). In fact, this Court has previously held that remand orders based on a lack of subject matter jurisdiction are not reviewable. See, *e.g., Godsey v. Miller*, 2001 U.S. App. LEXIS 9402 (6th Cir. 2001); *Thackeray v. Boats Express Corporation*, 1999 U.S. App. LEXIS 19808 (6th Cir. 1999); and *Anusbigian v. Trugreen/Chemlawn, Inc.*, 72 F.3d 1253 (6th Cir. 1996). Copies of the unreported opinions are attached hereto as **Exhibit "B."**

Whether Judge Polster employed the correct legal analysis in remanding this case back to Stark County is irrelevant. As this Court has previously stated:

> If a district court determines, ***rightly or wrongly***, that it lacks subject matter jurisdiction over a removed case, and for that reason remands it to the court from which it was removed, the court of appeals lacks jurisdiction to review the district court's decision.

Anusbigian, supra, at 1256. (Emphasis added.) See also *State of Ohio v. Wright*, 992 F.2d 616, 619 (6th Cir. 1993) ("It makes no difference that the District Court may be wrong in its conclusions concerning jurisdiction. . . . ")

Judge Polster's Order clearly states that diversity jurisdiction is lacking in this case. Therefore, because this case was remanded for lack of subject matter jurisdiction, the Order of remand is not reviewable. Therefore, Federal's appeal should be dismissed.

WHEREFORE, Appellees, Kenneth and Mary Jones, respectfully request that this Court dismiss Appellant, Federal Insurance Company's appeal based upon the non-reviewability of the Order of remand.

Respectfully submitted,

BLACK, MCCUSKEY, SOUERS
& ARBAUGH

By: /s/ Robert E. Soles, Jr.

Robert E. Soles, Jr. (#0046707)
John L. Juergensen (#0071071)
1000 United Bank Plaza
220 Market Avenue South
Canton, Ohio 44702
Telephone: (330) 456-8341
Telefax: (330) 456-5756
Email: bsoles@bmsa.com

Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was sent by ordinary U.S. Mail to **D. John Travis**, Esq., Gallagher, Sharp, Fulton & Norman, 1501 Euclid Avenue, Seventh Floor-Bulkey Building, Cleveland, Ohio 44115-2108; **Ronald A. Rispo**, Esq. and **Robert E. Goff, Jr.,** Esq., Weston Hurd Fallon Paisley & Howley, L.L.P., 2500 Terminal Tower, Cleveland, Ohio 44113-2241; and **David Bloomfield, Jr.**, Porter, Wright, Morris & Arthur, 41 South High St., Columbus, Ohio 43215, this 15th day of January, 2002.

/s/ Robert E. Soles, Jr.
Robert E. Soles, Jr.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

KENNETH R. JONES, *et al.*,	)	**CASE NO. 5:01CV1616**
Plaintiffs,	)	
vs.	)	**Judge Dan Aaron Polster**
FEDERAL INSURANCE CO., *et al.*,	)	**MEMORANDUM OF OPINION AND ORDER**
Defendants.	)	

On May 30, 2001, Plaintiffs Kenneth R. Jones and Mary B. Jones filed a Complaint in the Stark County Court of Common Pleas against Defendants Federal Insurance Company ("Federal Insurance") and American Motorists Insurance Company. Plaintiffs' Complaint arises out of a March 27, 1999 accident which occurred when a negligent driver struck Kenneth Jones as he was riding his motorcycle. Plaintiffs allege that they are insureds under their employers' uninsured/underinsured motorist insurance policies (*see, e.g., Scott-Pontzer v. Liberty Mutual Fire Ins. Co.*, 85 Ohio St. 3d 660 (1999)) and that the defendant insurers breached their contracts of insurance and acted in bad faith.

On July 2, 2001, Defendant Federal Insurance removed the case to this Court pursuant to 28 U.S.C. § 1332 (diversity jurisdiction). (ECF No. 1). On September 18, 2001, Plaintiffs filed an Amended Complaint (ECF No. 20) which added a third insurer, Energy Insurance (Bermuda, Ltd., to the case.

On October 19, 2001, the Court issued an opinion in *Kormanik v. St. Paul Fire and Marine Ins. Co.* (Case No. 5:01CV2122), remanding a *Scott-Pontzer* case for lack of jurisdiction. On October 22, 2001, the Court issued a Show Cause Order (ECF No. 29) which attached the *Kormanik* opinion and required Federal Insurance to explain why this case should not also be remanded. On November 1, 2001, Federal Insurance filed a response (ECF No. 32) to the Court's Show Cause Order. On November 5, 2001, Plaintiffs filed a Memorandum in Opposition (ECF No. 33) to Federal Insurance's response.

Having reviewed the parties' briefs, the Court finds that this case must be remanded for the same reasons stated in the *Kormanik* opinion. Although the defendant insurers are located in New Jersey, Illinois, and the Bahamas, at least one of the insureds, American Electric Power Co., Inc., is a citizen of Ohio. Because Plaintiffs are also citizens of Ohio, diversity jurisdiction is lacking.

For the reasons stated above, the Court hereby Orders that the above-captioned case be remanded to the Stark County Court of Common Pleas.

IT IS SO ORDERED.

S/Dan Aaron Polster 11/14/01
Dan Aaron Polster
United States District Judge

MARK THACKERAY, Plaintiff-Appellee, v.
BOATS EXPRESS CORPORATION, Defendant-Appellant.

No. 99-3530

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

1999 U.S. App. LEXIS 19808

August 16, 1999, Filed

COUNSEL: For MARK THACKERAY, Plaintiff-Appellee: Michael A. Paolucci, Cincinnati, OH.

For BOATS EXPRESS CORPORATION, Defendant-Appellant: Paul H. Lamboley, Washington, DC.

JUDGES: Before: KRUPANSKY, BOGGS, and CLAY, Circuit Judges.

OPINION: ORDER

The defendant appeals the district court's order remanding this action to the state court from which it was removed. The plaintiff moves to dismiss this appeal on grounds that the order is not appealable.

The plaintiff commenced the action in an Ohio common pleas court with a complaint that asserted state law causes of action and claimed damages for the defendant's failure to timely deliver a boat as agreed. The defendant removed the action to federal district court based on 49 U.S.C. § 14706 of the Interstate Commerce Act, also referred to as the Carmack Amendment. That statute imposes liability for "actual loss or injury to the property" caused by a carrier. The defendant argued that the plaintiff's causes of action were preempted by the Carmack Amendment. The district court granted the plaintiff's motion to remand, concluding that the plaintiff's action

was not for damage to the property and that, in fact, the defendant had not delivered the property. In a subsequent order denying a motion to reconsider and in an order denying a stay pending appeal, the court noted that its remand was based upon a lack of subject matter jurisdiction.

A court may remand a case for lack of subject matter jurisdiction at any time before final judgment. 28 U.S.C. § 1447(c). The removal statute further provides, at **§ 1447(d)**, that an order remanding a case to state court is not reviewable by appeal or otherwise. That section, however, bars review only of remands for the reasons stated in § 1447(c). *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S. 336, 46 L. Ed. 2d 542, 96 S. Ct. 584 (1976). Thus, **§ 1447(d)** precludes review of remand orders that are based on either a lack of subject matter jurisdiction or defects in removal procedure. *Quackenbush v. Allstate Insurance Company,* 517 U.S. 706, 712, 135 L. Ed. 2d 1, 116 S. Ct. 1712 (1996). This court has recognized a limited exception where the remand order is based on the merits of a collateral, substantive decision as opposed to an issue of jurisdiction. *Anusbigian v. Trugreen/Chemlawn,* 72 F.3d 1253 (6th Cir. 1996).

Although the defendant characterizes the district court's order as something other than a conclusion that it was without subject matter jurisdiction, the district court twice stated that it was remanding the action for lack of subject matter jurisdiction. Further, when a preemption issue is addressed that is necessarily related to the question of subject matter jurisdiction, it is not elevated to an appealable collateral issue. *See Baldridge v. Kentucky Ohio Transportation, Inc.,* 983 F.2d 1341, 1349 (6th Cir. 1993).

Therefore, the plaintiff's motion to dismiss this appeal for lack of jurisdiction is **GRANTED**.

ELMER GODSEY, Plaintiff-Appellee, v. KEN MILLER, CLYDE BOWLING, KANSAS SMITH, ASPLUNDH TREE EXPERT, INC., a corporation, and AMERICAN ELECTRIC POWER SERV. CORP., a corporation, Defendants-Appellants.

Nos. 00-5045, 00-5055

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

2001 U.S. App. LEXIS 9402; 9 Fed. Appx. 380

May 10, 2001, Filed

COUNSEL: For ELMER GODSEY, Plaintiff-Appellee (00-5045, 00-5055); Frank R. Riley, III, Whitesburg, KY.

For AMERICAN ELECTRIC POWER SERVICE CORPORATION, Defendant-Appellant (00-5045): Randall S. May, Barrett, Haynes, May, Carter & Roark, Hazard, KY.

For AMERICAN ELECTRIC POWER SERVICE CORPORATION, Defendant-Appellant (00-5045): David A. Laing, Marc L. Fleischauer, Porter, Wright, Morris & Arthur, Columbus, OH.

For KEN MILLER, CLYDE BOWLING, KANSAS SMITH, ASPLUNDH TREE EXPERT COMPANY, Defendants-Appellants (00-5055): Mark J. Hinkel, Shannon M. Naish, Landrum & Shouse, Lexington, KY.

JUDGES: Before: KRUPANSKY, BOGGS, and BATCHELDER, Circuit Judges.

OPINION: PER CURIAM. Elmer Godsey, a former employee of defendant Asplundh Tree Expert, Inc. ("Asplundh") has brought claims against all defendants alleging discrimination on the basis of age, in violation of the Kentucky Civil Rights Act, KY. REV. STAT. ANN. § 344.040

(Michie 1999), based on his termination from Asplundh. Godsey originally brought suit in state court, and defendants attempted to remove the case to federal court on the basis of diversity. Defendants Miller, Smith, and Bowling are, like Godsey, residents of Kentucky, but defendants asserted that Godsey's complaint failed to allege properly any genuine claim against these non-diverse parties, essentially claiming fraudulent joinder. The district court interpreted Godsey's complaint as alleging that the non-diverse parties were participants in a conspiracy in violation of KY. REV. STAT. ANN. § 344.280(2) (Michie 1999). Because of the consequent lack of diversity, the district court remanded the action to state court. Defendants now appeal the district court decision, which plaintiff claims is unreviewable under 28 U.S.C. § 1447(c). For the reasons that follow, we dismiss the appeal while vacating any residual effect of the district court's order.

I

Defendants Miller, Smith, and Bowling are employees of Asplundh; Asplundh was providing services under contract to defendant American Electric Power Service Corp. ("AEP") at the time of Godsey's termination. For purposes of this appeal, the parties accept Godsey's complaint as stating the facts behind this action. Godsey was a brush trimmer and employee of Asplundh, 65 years of age in 1999, when he was carrying out Asplundh's contract with AEP to clear the foliage from power lines. Defendants Miller, Bowling, and Smith are respectively, Foreman, Assistant General Foreman, and Supervisor at Asplundh. Godsey claimed that Miller had made "discriminatory inquiries" in the spring of 1999 into when Godsey was going to retire. On June 3, 1999, Miller, Bowling, and

Smith approached Godsey at his job site and told him that AEP did not want him working for them anymore. They informed Godsey he was laid off and transported him to his home in Perry County, Kentucky. This describes essentially the full content of the complaint with regard to the conduct of Miller, Bowling, and Smith (and AEP). In a later pleading (his response to AEP's motion to dismiss in federal court), Godsey stated that his complaint "inferentially alleged" that these defendants had conspired to "aid, abet, incite, compel or coerce" Asplundh to discharge Godsey, (Godsey Br. at 11), but no specific incidents of such persuasion were adduced, nor was the complaint ever amended.

Defendant Asplundh, not joined by defendant AEP, but together with Miller, Bowling, and Smith, filed a notice of removal with the federal district court. Acknowledging that Miller, Bowling, and Smith were Kentuckians, the notice claimed that they were "sham defendants which have been improperly joined as defendants in the present action for the sole purpose of defeating the jurisdiction of this Court." The notice argues that these defendants are a sham because Godsey's complaint mentioned only KY. REV. STAT. ANN. § 344.040 (Michie 1999) as statutory authority for his age discrimination complaint, a statute applicable only against employers rather than individuals. Acting separately in the federal court, defendant AEP filed a motion to dismiss on similar grounds, since AEP was also not Godsey's employer. Godsey defended removal by pointing out his complaint had alleged violations of "KRS 344.040 *et seq.*" and among the provisions "et seq." is KY. REV. STAT. ANN. 344.280(2) (Michie 1999), which allows non-employers to be held liable as part of a conspiracy to deprive a plaintiff of civil rights.

In December 1999, after receiving briefs from both side, [sic] the district court issued an order ruling on AEP's motion. The court concluded that Godsey had sufficiently alleged a conspiracy claim against AEP and "using the same rationale, Ken Miller, Clyde Bowling, and Kansas Smith can be sued under KRS 344.280(2)." In the next paragraph, the court then stated, "[t]he validity of this conspiracy cause of action ... destroys the complete diversity necessary to remove this suit under 28 U.S.C. § 1441. Therefore, the case will be remanded to the Perry Circuit Court." In making this ruling, the district court also adverted to the procedural flaw in the notice of removal, which was not signed by all defendants, as the court pointed out was required by 28 U.S.C. § 1446. However the court declined to "address the procedural error," "as this case is being remanded based on lack of diversity jurisdiction[.]"

The case was then stricken from the active docket, but the order was labeled "FINAL AND APPEALABLE." Following this suggestion, defendants have appealed it. Godsey, however, points to the language of 28 U.S.C. **§ 1447(d)**, which provides that "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ."

II

Standard of Review

If we were to find the issue reviewable, the standard of review on the district court's decision to remand would appear to be de novo. *Cf. Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.,* 176 F.3d 904, 907 (6th Cir. 1999) (reviewing a

denial of a motion to remand). The parties agree that this is the proper standard should we reach the issue.

Reviewability

The review of remand orders to state courts is barred by 28 U.S.C. § **1447(d)** when the order "falls into either category of remand order described in § 1447(c) . . . lack of subject matter jurisdiction or defects in removal procedure." *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 711, 135 L. Ed. 2d 1, 116 S. Ct. 1712 (1996). If "a district court remands a case based on the grounds listed in Section 1447(c), this Court cannot review the remand order." *Zuniga v. Blue Cross and Blue Shield of Michigan,* 52 F.3d 1395, 1400 (6th Cir. 1995) (citation and quotation omitted). This is true even if the district court's decision to remand proceeds from an erroneous basis. *Ibid.*

A limited exception, asserted by defendants, exists when the remand order is "based on a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction." *Regis Associates v. Rank Hotels (Management) Ltd.,* 894 F.2d 193, 194 (6th Cir. 1990). In *Regis,* this principle was used to allow review of a district court's decision to remand based on its interpretation of a contractual forum selection clause. The application of this exception, however, was found inappropriate when the district court based its remand for lack of subject-matter jurisdiction on its legal determination of the absence of federal preemption, *Baldridge v. Kentucky Ohio Transportation, Inc.,* 983 F.2d 1341, 1350 (6th Cir. 1993), or the lack of status as a federal officer. *See State of Ohio v. Wright,* 992 F.2d 616, 618-619 (6th Cir. 1993) (en banc).

On the face of Godsey's complaint, complete diversity was lacking. Therefore, in order for removal to occur, the defendants were required to show fraudulent joinder to eliminate the non-diverse parties, *see* 14B CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3723 (3d ed. 1998), and this is what they asserted, and what the district court was required to assess. "When a non-diverse party has been joined as a defendant, then in the absence of a substantial federal question the removing defendant may avoid remand only by demonstrating that the non-diverse party was fraudulently joined. Under the doctrine of fraudulent joinder, the inquiry is whether [plaintiff] had at least a colorable cause of action against [defendant] in the . . . state courts." *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.,* 176 F.3d 904, 907 (6th Cir. 1999); *see also Alexander v. Electronic Data Sys. Corp.,* 13 F.3d 940, 949 (6th Cir. 1994). In *Jerome-Duncan* we thus looked to the state law to determine whether the non-diverse defendant was a proper party or whether it was fraudulently joined, based on the legal sufficiency of the claim, and we disregarded any inquiry into plaintiff's actual motive in joinder. 176 F.3d at 907. The burden of proving fraudulent joinder is placed on the party asserting the existence of complete diversity. *See Alexander,* 13 F.3d at 949.

This case differs from *Regis* in that the issue of a forum selection clause is an independent contractual concern created by the actions of the parties, and is not linked to the inherent subject-matter jurisdiction of the court. By contrast, where review was not allowed in *Baldridge* and *Wright,* this linkage between the issue decided and jurisdiction was the fundamental reason against review: the decision of the issue asserted by

appellants to circumvent § **1447(d)** was held to have been a necessary precursor to a decision on the jurisdictional (§ 1447(c)) issue that had been before the district court. This also appears to be the case here, where the issue of fraudulent joinder and diversity – the jurisdictional question – was completely dependent on the prior determination of the adequacy of a conspiracy complaint that could reach non-diverse defendants.

In similar circumstances, where the district court interpreted Michigan law to determine if the amount in controversy was present before remanding, we have held the order to be beyond review. *See Anusbigian v. Trugreen/Chemlawn, Inc.*, 72 F.3d 1253 (6th Cir. 1996). In *Anusbigian,* the district court had been compelled to analyze whether the plaintiff could maintain an action under MICH. COMP. LAWS ANN. § 600.2961, which would have allowed his possible recovery to exceed the necessary amount in controversy; it was determined that he could not, which motivated the remand. *Id.* at 1254. In holding the order unreviewable in the face of plaintiffs's assertion of the *Regis* exception, we stated that the "fact that the district court based its jurisdictional determination on an interpretation of Michigan law is beside the point." *Id.* at 1257. We also noted that the district court's decision did not foreclose assertion of any issue for litigants; it foreclosed only "further litigation of [the] claim in federal court." *Ibid.*

We have previously held in unpublished persuasive authority that a court's decision of issues of fraudulent joinder does not amount to a substantive decision of the kind that may avoid the bar to reviewability. *See Calvert v. Xerox Corp.*, 1995 U.S. App. LEXIS 5341, No. 94-1701, 1995 WL 109000 (6th Cir. Mar. 14, 1995) (unpublished). In

Calvert, as here, defendants' attempt to remove was rejected and the federal district court remanded to state court. Defendants then asserted *Regis* as a route to reviewability of the remand order, including as one of the "substantive decision[s]" the district court's adjudication of their claims of fraudulent joinder to defeat diversity. We stated there that in "deciding whether a party has been fraudulently joined, the district court must consider whether there is a reasonable basis for predicting that the plaintiff could prevail against the non-diverse defendant. It does not appear that the district court went beyond this initial jurisdictional inquiry in ruling that the individual defendant had not been fraudulently joined." *Id.* at *2 (citation omitted) (finding remand unreviewable). Similarly, here the district court was required to assess the conspiracy claim to determine its jurisdiction; the primary reason it did so in the context of a motion to dismiss was that AEP had, quite improperly, not joined in the notice of removal which asserted essentially the same legal arguments.

It may well be that another court would find that the defendants carried their burden. *Cf. Stacy v. Shoney's Inc.,* 1998 U.S. App. LEXIS 6659, No. 97-5393, 1998 WL 165139 (6th Cir. Mar. 31, 1998) (finding fraudulent joinder in a similar suit despite explicit mention of the conspiracy statute). Unfortunately for the defendants, even a clearly erroneous decision does not provide us with a license to revisit a remand issued on the basis of a lack of subject-matter jurisdiction. *See e.g., Page v. City of Southfield,* 45 F.3d 128, 131 (6th Cir. 1995). Such orders are "beyond all power of appellate review, even if based on erroneous principles or analyses." *Ibid.*

The fact that § 1447 or "subject-matter jurisdiction" was not mentioned by the district court in its remand order does not change the analysis, if the decision was "clearly on jurisdictional grounds." *Anusbigian,* 72 F.3d at 1255; *see also Wright,* 992 F.2d at 617. Equally, the fact that the order was labeled as "appealable" does not make it appealable. *See Feidt v. Owens Corning Fiberglas Corp.,* 153 F.3d 124, 129 (3d Cir. 1998). In *Feidt,* the district court had not only certified the question for appeal, but the Third Circuit had also granted leave to appeal. Nonetheless, it was held that this could "not circumvent the jurisdictional bar of section **1447(d)**." *Id.* at 129 n.5 (finding remand order unreviewable). We hold the decision was clearly on jurisdictional grounds.

However, there remains some confusion regarding the district court's denial of defendant AEP's motion to dismiss, prior to its finding a lack of federal jurisdiction over Godsey's complaint. The district court repeated this denial in its order, stating that the "Defendant's motion . . . is hereby . . . DENIED" and only then ordering the remand in the next paragraph of the order. Although it is obvious that, without subject-matter jurisdiction, the court was without power to decide any substantive motion on the merits of the case, this sequence of analysis and orders has created unnecessary uncertainty regarding the nature and preclusive effect of the district court's ruling.

It is a well settled principle that "the district court must be certain that federal subject matter jurisdiction is proper before entertaining a motion by the defendant under Federal Rule 12 to dismiss the plaintiff's complaint for failure to state a claim upon which relief may be granted." 14C CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3739, at 423 (3d

ed. 1998). *See also Gross v. Hougland,* 712 F.2d 1034, 1036 (6th Cir. 1983) (stating "disapproval of the district court's decision to dispose of this action on the merits without first resolving the question of subject matter jurisdiction"). The preferred method is to determine whether the action has been properly removed and the court has jurisdiction before disposing of other pending motions. In the admittedly unorthodox posture of this case, this required treating AEP as the cart and the individual defendants as the horses pulling it; AEP's motion became moot as soon as the similar analysis applied to the conspiracy claims against the non-diverse parties failed to show fraudulent joinder. *See, e.g., Thompson v. Fritsch,* 966 F.Supp. 543, 545 (E.D. Mich. 1997) (refusing to address defendant's motion for summary judgment, which became moot after a finding of lack of jurisdiction).

Like the district court, we have no power under Article III to decide the merits of the case over which we have no jurisdiction. As just discussed, the district court has determined that the federal courts have no jurisdiction over this matter and we cannot revisit that determination. Nonetheless, we have the power to vacate any decision that lacked jurisdiction, a decision "which we cannot leave undisturbed." *Goldin v. Bartholow,* 166 F.3d 710, 718 (5th Cir. 1999). Our common solution in such cases is to vacate the judgment and remand with orders to dismiss, in order to clear the path for "relitigation of the issues" and prevent an unreviewable judgment from "spawning any legal consequences." *Brock v. UAW,* 889 F.2d 685, 696-97 (6th Cir. 1989) (citation and quotation omitted) (vacating and remanding with instructions to dismiss because of mootness). *See also Ford v. Hamilton Investments, Inc.,* 29 F.3d 255, 260 (6th Cir. 1994) (vacating and remanding with

instructions to dismiss district court's order issued without subject-matter jurisdiction).

III

Accordingly, we VACATE those portions of the order denying AEP's motion to dismiss, and REMAND this matter with instructions to dismiss this case (00-5045) for lack of subject-matter jurisdiction. We hold the district court's finding regarding jurisdiction and consequent order of remand to state court to be beyond review.

No. 01-1883

IN THE

SUPREME COURT OF THE UNITED STATES

FEDERAL INSURANCE COMPANY,

Petitioner,

v.

KENNETH R. JONES, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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REPLY OF PETITIONER

D John Travis
(*Counsel of Record*)
Alan M. Petrov
Robert H. Eddy
Richard C.O. Rezie
Gallagher, Sharp, Fulton
& Norman
1501 Euclid Avenue
7th Floor, Bulkley Building
Cleveland, Ohio 44115
(216) 241-5310
Attorneys for Petitioner

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Now comes Petitioner Federal Insurance Company ("Federal") in reply to the additional points raised in Respondents' Brief in Opposition to Federal's Petition for Writ of Certiorari. Federal refers this Honorable Court to the Corporate Disclosure statement contained in its original Petition for Writ of Certiorari, which remains accurate.

A. Respondents' reliance on the collateral order doctrine to ameliorate the conflict between the Circuits is misplaced.

Respondents assert that no conflict between the Circuits exists because the Sixth Circuit reviewed the District Court's remand order to determine if it was "based on a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction." (App. A to Petition at p. 4a.) The application of the collateral order doctrine was the first step in the analysis of the Third and Fourth Circuits, however, not the complete analysis.

Respondents cite three cases in support of the assertion that the Third, Fourth, Tenth, and Sixth Circuits review remand orders only to determine the applicability of the collateral order doctrine: *Borneman v. United States,* 213 F.3d 819, 824-26 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001); *Carr v. American Red Cross*, 17 F.3d 671 (3d Cir. 1994); and *Aliota v. Graham*, 984 F.2d 1350 (3d Cir. 1993), *cert. denied*, 510 U.S. 817 (1993). Respondents' assertion is incorrect. In each of the three cases, the Circuit Court looked beyond whether there was a collateral order on the merits to determine whether the remand order was reviewable.

In *Carr*, 17 F.3d at 679, the Third Circuit first determined whether a collateral final order which was reviewable was present. The court found "that we have

jurisdiction to review the district court's dismissal of Red Cross, regardless of our authority to review the district court's remand order." *Id.* Unlike the Sixth Circuit in the instant case, the court continued its analysis: "[w]e must now consider the question of the reviewability of the district court's remand order separate and apart from the reviewability of the order preceding remand." *Id.* The Third Circuit then forthrightly stated that "we have taken the progression [of the review of remand orders] one step further and have permitted appellate review of remand orders which are based on a district court's underlying jurisdictional determination which is inconsistent with a specific Congressional grant of federal jurisdiction." Respondents quote from the following paragraph of the court's opinion, but they omit the first line:

> This progressive development leads us now to hold that the sounder, *and additional*, approach to permitting review of a 1447(d) remand order is that where a district court's dispositive order—whether substantive or jurisdictional—is separable from the subsequent order of remand, and meets the finality requirement of §§ 1291, and where that final order triggers an order of remand, as it does here, the remand order itself must also be reviewable by the Court of Appeals.

Id. (emphasis added).

The broader scope of review utilized by the Third Circuit is in direct conflict with the Sixth Circuit's review here because the Sixth Circuit declined to determine whether the district court's remand was "inconsistent with a specific Congressional grant of federal jurisdiction." *Id.*; *accord*, *Aliota*, 984 F.2d at

1357 (" '[T]he district court's remand order was a departure so lacking in statutory basis, and so clearly contrary to Congressional policy as expressed in the Westfall Act, as to require our review by mandamus.' "), quoting *Nasuti v. Scannell*, 906 F.2d 802, 811 (1st Cir. 1990).

In *Borneman*, 213 F.3d at 825-26, the Fourth Circuit echoed the analysis in *Carr*. After first determining whether a collateral order existed to support jurisdiction, the Court went on to state that "even if a remand order does not in this oblique manner become subject to review when its underlying premises are appealed, §1447(d)'s restriction on appellate review of remand orders cannot be read categorically when other statutes in tension with it are considered." *Id.* at 825. The Fourth Circuit went on to hold that, as the Attorney General's scope-of-employment certification conclusively established the district court's jurisdiction, "the bar of §1447(d) does not preclude us from reviewing a remand order when the district court exceeds its authority." *Id.* at 826.

Respondents assert that the Circuits are not in conflict because all equally apply the collateral order doctrine. But, the Third, Fourth, and Tenth Circuits go far beyond the borders of this doctrine to review, in limited scope, the validity of the legal basis of the district court's remand order. Respondents do not even attempt to harmonize the review conducted in *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 845, (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992) or *Dalrymple v. Grand River Dam Authority*, 145 F.3d 1180, 1184 (10th Cir. 1998), *cert. denied*, 525 U.S. 1069 (1999) with that conducted by the Sixth Circuit in this case, nor could they. Therefore, a conflict between the Circuits exists and the Petition should be granted.

B. The authority of Congress to delimit the jurisdiction of the courts of the United States is not at issue.

Respondents assert that Federal is unreasonably requesting this Court to strike down every jurisdictional limitation on the courts of the United States. Although this Court would surely have the power and obligation to do so if all these jurisdictional statues were unconstitutional, that is not what Federal argues or seeks. Federal does not question the authority of the Congress to limit diversity jurisdiction to where the amount in controversy exceeds $75,000 or otherwise.

Federal's assertion is much less expansive and a point upon which Respondents appear to agree. Federal simply asserts that where Congress *has* vested jurisdiction in a court of the United States, the power so vested is Constitutional in origin and that were jurisdiction so vested is denied, the right violated is of constitutional import.

Respondents admit this to be the case on page 17 of their brief: "Provided a party meets the jurisdictional requirements set forth by Congress to maintain an action in federal court, a person's constitutional right to proceed against a citizen of another state cannot be infringed." Here, Federal has argued before the District Court and the Sixth Circuit that the direct action proviso in 28 U.S.C. §1332(c) is inapplicable because this action does not involve liability insurance, but rather, uninsured/underinsured motorist coverage and because this proviso is inapplicable where an insured sues his or her own insurer. Outside of Ohio, the courts are in accord on these points. Further, the statutory history of the Section 1332(c) proviso removes any doubt concerning the intended application of this statute.

Nonetheless, the District Court found the Section 1332(c) proviso applicable here. Congress intended and provided for the district courts to have jurisdiction in cases such as this, however. Therefore, Federal's constitutional rights were, as Respondents admit, violated by the remand order.

In fact, this issue brings to point the misapprehension in Respondents' argument that no conflict exists. Respondents fail to apprehend the import of the Third Circuit's holding that "courts will not impose restrictions on access to appellate review [of constitutional issues] unless Congress has expressed that intent by clear and convincing evidence." *In re TMI Litigation Cases Consolidated II*, 940 F.2d at 845 citing, *Webster v. Doe*, 486 U.S. 592, 603 (1988). The Third Circuit has "not [found] clearly expressed congressional intent which would preclude review" of constitutional issues raised in a remand order based upon want of subject matter jurisdiction. *Id.* Thus, as Federal raised an issue of admittedly constitutional import, the Sixth Circuit should have reviewed the remand order at least for error of constitutional import.

Respondents' insufficient attempts to harmonize the conflicting authority of the Circuits with reference to the collateral order doctrine and mischaracterization of Federal's constitutional arguments only serve to emphasize the need for this Court's intervention.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

D John Travis
(*Counsel of Record*)
Alan M. Petrov
Robert H. Eddy
Gallagher, Sharp, Fulton
& Norman
1501 Euclid Avenue
7th Floor, Bulkley Building
Cleveland, Ohio 44115
(216) 241-5310 - Telephone
(216) 241-1608 - Telefax
Attorneys for Petitioner.